

THE LAWFULNESS OF US DRONE STRIKES IN PAKISTAN:  
AN INTERNATIONAL PERSPECTIVE

BY

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## APPROVAL

The undersigned certify that this thesis meets master's-level standards of research, argumentation, and expression.

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## DISCLAIMER

The conclusions and opinions expressed in this document are those of the author. They do not reflect the official position of the US Government, Department of Defense, the United States Air Force, or Air University.



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Major Donaldson entered the United States Air Force in 1991 after graduating first in his high school class. He was the honor graduate from his enlisted aviation technical training school, and was assigned to Offutt Air Force Base in Omaha, Nebraska where he flew in his enlisted role in support of the "Looking Glass" and the National Emergency Airborne Command Post "NEACP" platforms. After flying for several years in this capacity, Major Donaldson left the active duty Air Force and was commissioned in the New York Air National Guard.

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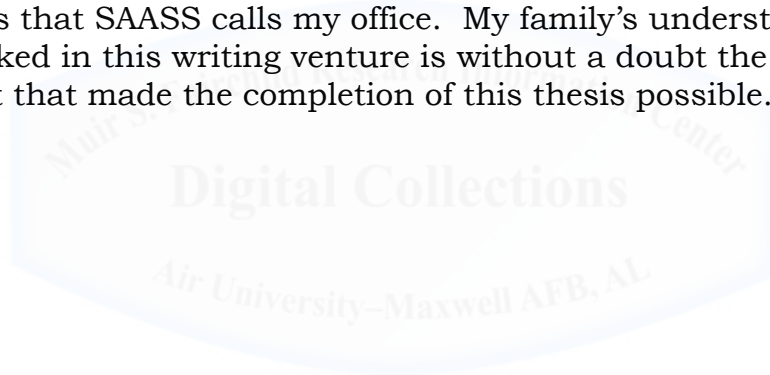


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## ABSTRACT

In response to the terrorist attacks of 9/11, the US has been conducting covert targeted killing operations against al-Qaeda, the Taliban and other associated forces located in Pakistan's Federally Administered Tribal Areas (FATA). Using remotely piloted aircraft, also known as drones, the US has been able to bring lethal justice to those responsible for the 9/11 attacks by killing America's enemies in this territory in northwestern Pakistan, and with much tactical success. One report has noted that since 2004, more than 550 alleged terrorists have been killed by US drone strikes to include the infamous leader of the Pakistani Taliban, Baitullah Mehsud. Lauded by politicians and loathed by our enemies, American drones have offered quick strikes, and measurable results, all under a blanket of secrecy. Despite the tactical success and political embrace of the covert drone strike program, however, there is evidence to suggest that their employment has come at the greater expense of violating international legal standards that regulate a state's use of lethal force. America's drone strike policy comes in the face of intense US criticism that has likened American drone strikes to terrorist acts themselves, and extrajudicial killings, assassinations in violation of international law. Despite the public outcry from the international community, to date the US has failed to articulate in any detail satisfying to its critics the lawfulness of its actions. The stepped up pace of American drone strikes coupled with the international criticism, in the face of American silence, on the lawfulness of its actions has made the legal analysis of US drone strikes in Pakistan's FATA that more pressing. This study comprises a look at the international laws that are implicated by US drone strikes in Pakistan's FATA. These laws include Human Rights Law, the law of interstate force, and International Humanitarian Law. The American drone strikes in Pakistan have been evaluated for their compliance with these legal standards and the conclusion is that the US drone strikes in Pakistan are unlawful. Such violations have negative implications on the future of America's relations with the international community.

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## Introduction

In response to the horrific terrorist attacks on 9/11, the US has been conducting targeted killing operations against al-Qaeda (AQ), the Taliban and associate forces in countries around the globe. Using Remotely Piloted Aircraft (RPA), also known as drones, the US has been able to bring lethal justice to those responsible for the 9/11 attacks, and who continue to threaten American security interests. While some US drone strikes, in Afghanistan for example, have remained relatively transparent where US-led coalition forces use them regularly to support battlefield operations, other US drone strikes, designated covert, are being conducted in countries that are not at war with the US and in territories far from any known battlefield. These secret targeted killing operations, conducted primarily by the Central Intelligence Agency (CIA), have been reported in the media and confirmed by eye witness accounts in Yemen, and Somalia, but most notably in Pakistan's Federally Administered Tribal Areas (FATA).

Sharing a 373 mile long border with Afghanistan, this rugged terrain in northwestern Pakistan provides AQ and the Taliban with a natural impediment to Pakistan's law enforcement.<sup>1</sup> From this safe-haven, these terrorists are able to conduct cross border raids into Afghanistan where they kill civilians and soldiers before retreating back across the border to their Pakistani sanctuary. With questions of Pakistani sovereignty at stake, the US has not publicly endorsed a military campaign that pursues these terrorists across the Afghanistan-Pakistan (AfPak) border. Instead, the US has demanded that Pakistan neutralize the terrorist threat in the FATA with Pakistan's own domestic forces. With US financial incentives, Pakistan has responded, but their efforts have failed to mitigate the threat entirely. Privately plugging the

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<sup>1</sup> "Federally Administered Tribal Areas," *Global Security.Org*, <http://www.globalsecurity.org/military/world/pakistan/fata.htm>, (accessed April 15, 2012).

gap, covert US drone strikes have been targeting AQ and Taliban fighters in Pakistan's FATA and with much tactical success.<sup>2</sup>

One report has revealed that since 2004, between 550 and 850 suspected AQ militants have been killed by covert drone strikes in Pakistan's FATA.<sup>3</sup> These drone strikes have reportedly killed a number of high ranking Taliban and AQ militants, to include Baitullah Mehsud, the former leader of the Taliban in Pakistan. In an unguarded moment, former Director of the CIA Leon Panetta speaking to the success of the covert drone strike program stated that it was, "the only game in town in terms of confronting and trying to disrupt [a]l-Qaida leadership."<sup>4</sup> Such acknowledgment speaks to the US Administration's embrace of the secret drone strikes given their effective use against these non-state actors.

Aside from its tactical successes, the noted lethality of this secret program also has its own political advantages. The drone strikes have provided politicians with a way to measure America's success in its ongoing war on terror. Indeed, a bad actor body count in Pakistan's FATA has been an attractive metric. The covert drone strike program also has provided the Obama Administration with plausible deniability for a lethal targeting operation that kills bad actors in a country with no formal American military presence, a fact which is appealing for political and diplomatic reasons.

Notwithstanding its tactical successes and political embrace, however, the death and destruction brought to Pakistan's FATA by US drone strikes has brought widespread condemnation by the international community, which views America's war on terror policy unlawful by

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<sup>2</sup> K. Allen Kronstadt & Kenneth Katzman, "Islamic Militancy in the Pakistan-Afghanistan Border Region and US Policy," Congressional Research Service, 21 November 2008, 12, <http://www.fas.org/sgp/crs/row/RL34763.pdf> (accessed 23 April 2012).

<sup>3</sup> Peter Bergen and Katherine Tiedermann, "The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010," *New America Foundation*, 24 February 2010, 3, [http://www.newamerica.net/publications/policy/revenge\\_of\\_the\\_drones](http://www.newamerica.net/publications/policy/revenge_of_the_drones) (accessed 15 April 2012).

<sup>4</sup> Pam Benson, "U.S. Airstrikes in Pakistan called 'very effective,'" *CNN*, 18 May 2009 <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/> (accessed 15 April 2012).

international standards. Some have called the US drone strikes terrorist acts themselves, while others have stated that US drone strikes are extrajudicial killings, assassinations in violation of international law.<sup>5</sup>

Despite the outcry from international legal regimes, states, and scholars, however, to date the US has failed to articulate in any detail satisfying to its critics the lawfulness of its actions. The closest America has come to clarifying its lethal targeting policy came when Legal Advisor Koh addressed a group of scholars that were attending the American Society of International Law in 2010.<sup>6</sup> There, Legal Advisor Koh claimed on the subject of drone strikes that, “the United States is in an armed conflict with AQ, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right of self-defense under international law.”<sup>7</sup> Koh went on to say that the, “Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts.”<sup>8</sup> Koh’s statements were reaffirmed by a series of recent speeches made by US officials, who further elaborated on the lawfulness of US drone strikes.<sup>9</sup> Despite the State Department’s attempts at clarity, its chosen words framed the debate regarding the lawfulness of drone strikes on the broad assumption that America was in

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<sup>5</sup> Sahil Kapur, “67% of Pakistani journalists say US drones attacks are acts of terrorism: survey,” *The Raw Story*, 14 February 2011, <http://www.rawstory.com/rs/2011/02/14/67-of-pakistani-journalists-say-us-drones-attacks-are-acts-of-terrorism-survey/> (accessed 23 April 2012); Michael W. Lewis & Vincent J. Vitkovsky, “The Use of Drones and Targeted Killing in Counterterrorism,” *The Federalist Society for Law and Public Policy Studies*, 23 December 2010, [http://www.fed-soc.org/publications/pubid.2045/pub\\_detail.asp](http://www.fed-soc.org/publications/pubid.2045/pub_detail.asp) (accessed 23 April 2012).

<sup>6</sup> Harold Hangju Koh, “The Obama Administration and International Law,” U.S. Department of State, 25 March 2010, 12, <http://www.state.gov/s/1/releases/remarks/139119.htm> (accessed 15 April 2012).

<sup>7</sup> Koh, “The Obama Administration and International Law,” 12.

<sup>8</sup> Koh, “The Obama Administration and International Law,” 9.

<sup>9</sup> See Jeh Charles Johnson, “National Security law, lawyers, and lawyering in the Obama Administration,” Dean’s Lecture at Yale Law School, 22 February, 2012, 3, <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school.com> (accessed 8 May 2012); Eric Holder, Speech at Northwestern University School of Law, Department of Justice, 5 March 2012, 3, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (accessed 8 May 2012); John O. Brennan, “The Ethics of Efficacy of the President’s Counterterrorism Strategy,” *Council on Foreign Relations*, 30 April 2012, 7, <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100> (accessed 8 May 2012).

an armed conflict with these bad actors, but failed to articulate the legal reasoning used for arriving at that conclusion. Consequently, the US Administration's assertions have left many questions unanswered regarding the lawfulness of America's secret drone strike program.

America's determination to treat AQ, the Taliban and others as being lawful belligerents in an armed conflict is a legal interpretation that is not shared by some of America's closest allies. England, for example, is on the record as treating terrorists as criminals who violate the domestic laws of the State where the acts of violence occur. As the British government stated during its acceptance of the Geneva Conventions governing the international laws of armed conflict, "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a kind of situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."<sup>10</sup> Under Britain's legal interpretation, due process of law, as opposed to lethal targeting, has been the appropriate framework for ensuring that acts of terrorism are prosecuted under the laws of peace. Echoing British reservations on the armed conflict concept, France also expressed similar sentiment when it became a party to the Additional Protocols in 1977.<sup>11</sup> These American allies, despite its traditionally shared American ideals, stand in stark contrast to current US policy that treats AQ as a belligerent party to an armed conflict under international law.

The current US policy toward targeted killing operations also stands in stark contrast to previous US Administrations. Indeed, prior to 2001 the US treated terrorists as criminals under a peacetime legal framework. This US policy towards terrorism was expressed by then US Ambassador to Israel, Martin Indyk, who stated on television regarding

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<sup>10</sup> Mary Ellen O'Connell, "The Choice of Law Against Terrorism," *Social Science Research Network*, 348, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1654049](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654049) (accessed 23 April 2012).

<sup>11</sup> Additional Protocols I, Reservation/Declaration, Apr. 11, 2001, <http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument> (accessed 23 April 2012).



Israel's killing operations that targeted Hamas insurgents that, "[t]he United States government is very clearly on the record as against terrorist assassinations. They are extrajudicial killings, and we do not support that."<sup>12</sup> Ambassador Indyk's words reflected a US understanding that a state could not use lethal force to kill terrorists because they were not belligerents in an armed conflict where presumably direct targeting with lethal force would be lawful. Instead, American practice at the time was to treat terrorists as criminals and provide them with due process in accordance with the legal mandates of domestic law enforcement. This peacetime framework was seen previously in America's capture, arrest and trial of the terrorists responsible for the attacks on the World Trade Center in 1993.<sup>13</sup> Similarly, this American belief also evidenced itself when the US brought a federal indictment against Osama bin Laden for his support of the US embassy bombing in Kenya and Tanzania in 1998.<sup>14</sup> After 9/11, however, the paradigm in which America thought about terrorism and its impact on society changed. The new American policy brought down the full measure of US strength on terrorists who were previously seen as criminal, but nevertheless, a manageable nuisance.

Under the relatively new US interpretation, America is involved in an armed conflict with these terrorists who are now belligerents and subject to targeted killing operations. According to the American interpretation, the battlefield with AQ extends globally and is said to exist wherever the AQ operative decides to lay down roots. Like a backpack, the armed conflict attaches itself to the backs of these insurgents, and travels with them across State borders into the

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<sup>12</sup> Marjorie Cohn, "The Targeted Assassination of Osama Bin Laden," *Voices for Creative Nonviolence*, <http://vcnv.org/the-targeted-assassination-of-osama-bin-laden> (accessed 23 April 2012).

<sup>13</sup> Laurie Mylroie, "THE WORLD TRADE CENTER BOMB: Who is Ramzi Yousef? And Why It Matters," *The National Interest*, Winter, 1995/96, <http://www.fas.org/irp/world/iraq/956-tni.htm> (accessed 23 April 2012).

<sup>14</sup> Steven Emerson, "Inside the Osama Bin Laden Investigation," *The International Association for Counterterrorism & Security Professionals*, <http://www.iacsp.com/itobl> (accessed 23 April 2012).



territories of other countries that are not at war with the US.

Nevertheless, the US views these non-state actors as combatants in a global fight, which can be targeted lawfully with lethal force regardless of their location. This American policy was stated in 2003 by Charles Allen, then the Deputy General Counsel for the Department of Defense for International Affairs. According to the statesman, America could target any person with lethal force at any time regardless of location so long as intelligence confirmed that the person being targeted had ties to AQ.<sup>15</sup> Former US National Security Advisor Condoleezza Rice also echoed this sentiment when she said describing America's engagement with AQ terrorists that the US was in a, "...new kind of war to be fought on different battlefields."<sup>16</sup> This would include even American citizens with AQ ties that go abroad to Afghanistan and Pakistan's FATA to seek the fame of Islamic jihad. When asked if the US could lethally target AQ terrorists living within the US, the State Department has claimed that the President has the authority to authorize such actions.<sup>17</sup>

Disturbingly, the perception now is that the US has framed the issue with terrorists as an armed conflict in order to relax the human rights standards that protect humans from the arbitrary use of lethal force. Under the so called armed conflict with these terrorists, the life of any individual can be snuffed out with a Hellfire missile launched from a CIA drone when US intelligence deems there to be an AQ link. Under this US interpretation, even the lives of US citizens are not safe according to its advocates. America's recent targeted killing operation of American

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<sup>15</sup> Mary Ellen O'Connell, "Seductive Drones: Learning from a Decade of Lethal Operations," *Social Science Research Network*, 1 August 2011, 11, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1912635](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912635) (accessed 15 April 2012), citing Anthony Dworkin, "Law and the Campaign against Terrorism: The View from the Pentagon," interview conducted December 16, 2002.

<sup>16</sup> Howard Witt, "U.S.: Killing of Al Qaeda suspects was lawful," *The Chicago Tribune*, 24 November 2002, [http://articles.chicagotribune.com/2002-11-24/news/0211240446\\_1\\_al-qaeda-killings-terrorist](http://articles.chicagotribune.com/2002-11-24/news/0211240446_1_al-qaeda-killings-terrorist) (accessed 23 April 2012).

<sup>17</sup> Katerina Ossenova, "DOJ Official: President May Have Power to Order Terror Suspects Killed in US," *Jurist*, 5 February 2006, <http://jurist.law.pitt.edu/paperchase/2006/02/doj-official-president-may-have-power.php> (accessed 23 April 2012).

cleric, al-Awlaki, in Yemen proves that citizenship will not mitigate the US legal interpretation.<sup>18</sup>

Under peacetime conditions, a targeted killing operation against a terrorist is never allowed because human rights law (HRL) prevents lethal force from being the sole objective in a criminal prosecution.<sup>19</sup> Instead, HRL demands that a criminal be afforded an opportunity to surrender, and that his arrest and capture be the primary goals of domestic law enforcement. While lethal force can be used in peacetime, its use is limited to protecting the life of another that is immediately threatened with life-threatening harm.<sup>20</sup> In contrast, during wartime, HRL exists, but its lethal force limitations are somewhat relaxed as they pertain to an adversary in an armed conflict. Under such circumstances, a person can be targeted directly with lethal force, without having to first provide him with a surrender opportunity.<sup>21</sup> Thus, there are legal reasons for the US, which has been prosecuting terrorists with drone strikes far from any known battlefield, to characterize its struggle with AQ as an armed conflict, even though the objective evidence on the ground may not support this assertion. The stepped up pace of American drone strikes coupled with international criticism, in the face of American silence, of the lawfulness of its actions has made the legal analysis of US drone strikes in Pakistan that more pressing.

The purpose of this paper is to provide evidence that US drone strikes in Pakistan's FATA may not comply with international legal standards. To demonstrate this, I have used the international legal frameworks that are implicated by US drone strikes in Pakistan's FATA

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<sup>18</sup> Mark Mazzetti, Eric Schmidt and Robert F. Worth, "Two-Year Manhunt Led to Killing of Awlaki in Yemen," *The New York Times*, 30 September 2011, <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all> (accessed 23 April 2012).

<sup>19</sup> UN General Assembly, 14th Session, Human Rights Council, *Report of the Special Rapporteur, Philip Alston*, 28 May 2010 (A/HRC/14/24/Add.6), 9.

<sup>20</sup> UN General Assembly, 61<sup>st</sup> Session, Note by the Secretary-General, *Extrajudicial, summary or arbitrary executions*, 5 September 2006 (A/61/311), paras. 43-4.

<sup>21</sup> Geneva Conventions Common Article 3, Additional Protocols I, arts. 50(1), 52(1-2).

to analyze the reported facts surrounding these strikes. Applying the facts that we know to the rules provided by these legal authorities indicates that the US drone strikes in Pakistan's FATA are unlawful. Furthermore, such violations have long-term negative implications for the US because such deviations threaten to undermine America's international legitimacy. The violations also risk establishing a pattern of behavior that if followed by other states could be detrimental to US interests.

In Chapter 1, I will analyze the international legal frameworks that are implicated by US drone strikes in Pakistan's FATA. These legal paradigms include HRL, *jus ad bellum* laws, which govern the laws of interstate force, and International Humanitarian Law (IHL) also known as the Law of Armed Conflict (LOAC). These legal authorities are relevant to assessing the lawfulness of US drone strikes in Pakistan and each will be evaluated separately for discussion purposes. It should be noted, however, that all three legal paradigms overlap in the context of US drone strikes. The separate treatment is designed to familiarize the reader with each framework so that an effective synthesis of all three can be better understood.

In Chapter 2, I will be using the legal frameworks outlined in the previous chapter to determine the lawfulness of US drone strikes in Pakistan. With HRL as the baseline, I will first be assessing the lawfulness of America's use of interstate force within Pakistan to see if the US operations violate Pakistan sovereignty. Next, I will be using IHL to determine if an armed conflict exists between the US and these terrorists justifying the use of lethal force against these non-state actors in Pakistan. Finally, if it is determined that an armed conflict exists, then I will be using the *jus in bello* principles of necessity, distinction, proportionality, and humanity to determine whether the rules of war have been violated.

My conclusion will direct attention to the long term implications that stem from America's targeted killing operations. From an international relations' perspective, America's disregard of international law undermines America's soft power influence across the world much to its detriment. The US has sacrificed its long term strategic view in exchange for the drone's short-term tactical gains against terrorism, which plays well with domestic politics, but not with an international audience. America's indifference to the international laws it helped establish threatens its legitimacy with the global community, which views America's actions as counter to its stated ideals and beliefs. As the hegemon in a unipolar world, the US has a responsibility to ensure that its actions comply with international laws because reciprocity dictates that what goes around, comes around. In the future, the US may find itself, without a course correction, on the receiving end of the same unlawful policies it helped establish much to its own demise.

I have chosen to limit my analysis to international legal standards that are generally recognized by the international community as governing the State sponsored use of lethal force. While it is recognized that American laws governing the use of force are potentially triggered by such analysis, I will not be discussing US domestic law nor have I considered it as persuasive in my evaluation. Instead, I have honed my analysis to determine if America's stated policy of conducting drone strikes in accordance with international law follows through to its actual practice.

This paper is also not intended to address any US domestic law implications, which may stem from US drone strikes that target American citizens living in foreign countries. Instead, I have limited my analysis to the international legal frameworks. While provisions of US law and the Constitution are relevant to the overall question of the lawfulness of drone strikes, it is beyond the scope of this paper.

The author is aware that there have been documented reports of US drone strikes in other countries besides Pakistan, such as Afghanistan, Yemen, and Somalia. The drone strikes in Afghanistan are part of an internationally recognized armed conflict within that country. Given that drones are another battlefield weapon to be used by coalition forces, their use in Afghanistan, absent a violation of the rules of war, is not per se unlawful and thus, will not be included within my discussion. The Yemen and Somalia drone strikes also have not been incorporated into my analysis. While these targeted killing operations evidence a dangerous American trend of unlawfully extending the bounds of the existing legal frameworks, I have opted to focus solely on the lethal strikes in Pakistan where their consistent use has been widely reported and well-documented.

Finally, the law, evidence and facts to support the conclusions of this paper were taken from open source material. Thus, this study is not an examination into the classified world that surrounds America's drone strikes in Pakistan. I have purposely limited myself to the open source material. Since I am determining the lawfulness of US drone strikes in Pakistan based upon international legal standards, I have used the same source material that the international community would use for itself to judge the lawfulness of US actions.

## **Chapter 1**

### **Exploring Human Rights Law, the Law of Interstate Force, & International Humanitarian Law**

The legal frameworks that are implicated by US drone strikes in Pakistan's FATA include Human Rights Law (HRL), the law of interstate force, also known as *jus ad bellum* laws, and International Humanitarian Law (IHL), also known as the Law of Armed Conflict (LOAC). While each international framework offers its own legal distinctions, many of the legal issues surrounding American drone strikes involves an overlay of all three paradigms. It is only through understanding each of the applicable international standards that a cogent analysis can take place to determine whether US practice violates international law. Consequently, this chapter will explore each of these legal paradigms to familiarize the reader with each framework so that an effective synthesis of all three can be better understood. Before discussing each of these frameworks, the background of drones bears mention.

#### **The Drone Evolution**

America's use of drone's to conduct targeted killing operations against specific individuals is a relatively novel concept. Drones were originally developed as a non-kinetic platform designed to gather intelligence on opposing governments and regimes. In 1994, the first modern U.S. drone, the Predator, was employed in the skies over Bosnia to collect vital intelligence on the location and posture of Serbian forces.<sup>1</sup> It enjoyed much operational success, which was celebrated by the US military, and the Central Intelligence Agency (CIA), which saw the intelligence, surveillance, and reconnaissance (ISR) value of this new technological wonder. Subsequently, the Predator drone was outfitted with missiles to complement the onboard intelligence gathering sensors.

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<sup>1</sup> "RQ-1A/MQ-1 Predator UAV," *Defense Update*, <http://defense-update.com/products/p/predator.htm> (accessed 23 April 2012).

The weapons grade Predator, also known as the MQ-1, and in 2007, its robust *Reaper* counterpart, ultimately became the platforms of choice for fighting the Iraq and Afghanistan wars.<sup>2</sup>

Armed drones are appealing for a number of reasons. Drone technology has removed the pilot from the seat in the aircraft and instead, placed him out of harm's way, on the ground behind flight controls far from the traditional battlefield. For example, drones flying in support of Operation Enduring Freedom (OEF) in Afghanistan are frequently piloted by military officers that are based at Creech, an Air Force installation located near Las Vegas, Nevada.<sup>3</sup> Similarly, covert US drones are secretly controlled by CIA employees operating from their headquarters near Langley, Virginia.<sup>4</sup> Drones have the ability to conduct surveillance and intelligence gathering for extended periods of time and well beyond what an onboard pilot could endure with any degree of operational effectiveness. Indeed, drone technology has removed the requirement for courage and replaced a tired pilot's eyes with automated onboard sensors that are capable of operating with precision after lengthy periods aloft. Armed with hellfire missiles, drones with their onboard sensors are able to quickly and accurately engage targets that may become available after their remote operators have identified a target for neutralization.<sup>5</sup>

The US and other states have recognized the benefits of drones and thus, have incorporated this new technology into policies that embrace this relatively new technology. The US, Israel, Russia, China, Pakistan,

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<sup>2</sup> "Reaper' moniker given to MQ-9 unmanned aerial vehicle," *US Air Force*, 14 September 2006, <http://www.af.mil/news/story.asp?storyID=123027012> (accessed 23 April 2012).

<sup>3</sup> "Drones: America's New Air Force," *CBS News*, 16 August 2009, [http://www.cbsnews.com/2100-18560\\_162-5001439.html](http://www.cbsnews.com/2100-18560_162-5001439.html) (accessed 23 April 2012).

<sup>4</sup> Tara McKelvey, "Covering Obama's Secret War," *Columbia Journalism Review*, May/June 2011, [http://www.cjr.org/feature/covering\\_obamas\\_secret\\_war.php?page=all&print=true](http://www.cjr.org/feature/covering_obamas_secret_war.php?page=all&print=true) (accessed 23 April 2012).

<sup>5</sup> "MQ-1B PREDATOR," *US Air Force*, 5 January 2012, <http://www.af.mil/information/factsheets/factsheet.asp?id=122> (accessed 23 April 2012).



India, Iran, the United Kingdom and France either have the drone technology or are seeking drones that have the weapons' grade capability.<sup>6</sup> The proliferation of drone technology speaks to its technological allure. It also speaks to the readiness of states to incorporate drones into their foreign policy agendas. As its main advocate, the US has championed the drone technology and what it has offered the policymaker. For the Obama Administration, drones have become the political tool that can be used to clean the world of bad actors in a way that can be done quickly, cheaply and with minimum American casualties.

Despite its tactical success and political appeal, however, there is evidence to suggest that American drone strikes in Pakistan have come at the greater expense of violating international legal standards. The US asserts that it is engaged in an armed conflict with AQ, which justifies its position of using lethal force to target these non-state actors who occupy the territory of countries not at war with the US. The implication by the US position is that the entire world is a battlefield in which the US is free to target AQ and Taliban militants, but is that really the case? As it will be shown, the harmonious tenets that underlie HRL demand that peace as opposed to war be the international status quo. A contrary interpretation would erode the fundamental HRL protections, which makes the use of force the exception as opposed to the rule.

## **Human Rights Law**

HRL is a body of international law that reflects a collective understanding of international society towards the global population. In the greater picture, IHL provides laws, rules, and safeguards that protect

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<sup>6</sup> UN General Assembly, 14th Session, Human Rights Council, *Report of the Special Rapporteur, Philip Alston*, 28 May 2010 (A/HRC/14/24/Add.6), 9; David Cortright, "The scary prospect of global drone warfare," *CNN*, 19 October 2011, <http://www.cnn.com/2011/10/19/opinion/cortright-drones/index.html> (accessed 30 April 2012).



a number of inalienable rights, which are said to belong to every human being in the world. This would include citizens in the US, and also individuals, including AQ militants, living in Pakistan's FATA. These rights have been identified as sacred by the international community and are equally afforded to all human beings regardless of an individual's race, religion, color, ethnicity, sex, or cultural orientation.<sup>7</sup> These rights are resolute and as such, cannot be arbitrarily deprived by State authority. They include political, civil, economic, social and cultural rights, which according to the international community, can only be realized and not deprived in an environment of freedom, justice, and peace.<sup>8</sup> The UN reflects this collective understanding and in furthering its goal of fostering such an environment has codified through covenant the resolute nature of these rights. These international covenants are binding legal authority on those states, including the US, which have ratified their provisions.<sup>9</sup>

The UN Covenant on Civil and Political Rights (ICCPR) articulates many of these rights. The ICCPR, for example, protects the fundamental human right to pursue one's own economic, social, and cultural development, a right of self-determination that shall not be arbitrarily deprived by State authority.<sup>10</sup> Similarly, the law also speaks to the right of every person to not be enslaved by State authority, and for young people to enjoy the protections against child exploitation.<sup>11</sup> In relevant part, the ICCPR also speaks to the fundamental nature of life. Specifically, Article VI of the ICCPR states that, "every human being has an inherent right to life. This right shall be protected by law. No one

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<sup>7</sup> UN General Assembly, "International Covenant on Civil and Political Rights [hereinafter ICCPR]," *United Nations Treaty Series*, 16 December 1966, vol. 999, 171, <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 24 April 2012).

<sup>8</sup> UN General Assembly, ICCPR, art. (1).

<sup>9</sup> For the US ratification of the ICCPR, see UN General Assembly, "ICCPR," 8 June 1992, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (accessed 23 April 2012).

<sup>10</sup> UN General Assembly, "ICCPR," art. (1).

<sup>11</sup> UN General Assembly, "ICCPR," arts. (8, 24).

shall be arbitrarily deprived of his life.”<sup>12</sup> It is this provision within the ICCPR that is most relevant as it relates to US drone strikes that target Pakistani militants with lethal force.

The ICCPR protects the right to life to the extent that it forbids its arbitrary deprivation, but what is arbitrary will necessarily depend upon the context of the situation. Under peacetime conditions, the right for a State to use lethal force to target the life of an individual is determined based upon the principles of HRL. Under such circumstances, the resolute nature of the right to life precludes a State from using lethal force against a criminal suspect as its main objective under the peacetime legal framework.<sup>13</sup> A criminal is still afforded all the legal protections guaranteed by the due process of law. This includes, for example, the right for a criminal suspect to surrender to a State authority where his capture, arrest, and ultimately, a court of law, will determine his fate.<sup>14</sup> Although lethal force can play a role in the peacetime legal framework, according to HRL, its application is limited to the extent that it is needed to protect the life of another.<sup>15</sup> This legal tenet is reflected in the *United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials*, which has been adopted as State practice throughout the world. In pertinent part, this law states that, “[l]aw enforcement officials shall not use firearms against persons except in self-defense or defense of others against imminent threat of death or serious injury...[The] intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”<sup>16</sup> Thus, as the UN mandate makes clear, in times of peace, the State must

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<sup>12</sup> UN General Assembly, “ICCPR,” art. (6).

<sup>13</sup> UN General Assembly, *Report of the Special Rapporteur*, 9.

<sup>14</sup> UN General Assembly, “ICCPR,” art. (14).

<sup>15</sup> UN General Assembly, 61st Session, Note by the Secretary-General, *Extrajudicial, summary or arbitrary executions*, 5 Sep. 2006 (A/61/311), paras. 33-45.

<sup>16</sup> UN General Assembly, 8<sup>th</sup> Congress, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 7 Sep. 1990, <http://www2.ohchr.org/english/law/firearms.htm> (accessed 23 April 2012).

ensure that the capture and arrest of the suspect are the primary objectives of a State's law enforcement model. A State policy that makes killing the suspect the primary objective behind the operation is per se unlawful because it violates the peacetime restraint against the use of force and thus, arbitrarily deprives the subject of his right to life.

In contrast, in times of war what constitutes an arbitrary deprivation of one's life is not the same as under peacetime conditions. It is said that during peacetime, HRL is the *lex generalis* (general law) that provides the analytical framework for ensuring that lethal force is used only as a last resort.<sup>17</sup> In times of armed conflict, however, a different legal authority is triggered. In this regard, IHL provides the specific analytical framework that determines whether the use of force against an individual is arbitrary. Under such conditions, the IHL is said to be the *lex specialis* (specific law) applicable in the context of armed conflict.<sup>18</sup> In armed conflicts, the State can lawfully use lethal force against a lawful belligerent without violating its obligations to the individual under HRL provided the rules of war have not been violated.<sup>19</sup> While the principles of HRL are said to exist within an armed conflict, their effect at preserving one's right to life is muted to the extent that they contradict provisions of IHL once a lawful target has been validated.<sup>20</sup> Under such circumstances, the rules of war, as opposed to the rules of peace, will be the primary legal authority that decides the fate of a belligerent party, which is consistent with previous ICJ holdings.

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<sup>17</sup> Chris Jenks, "Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict," *Social Science Research Network*, 662-3, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1569904](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569904) (accessed 15 April 2012).

<sup>18</sup> Jenks, "Law from Above," 662.

<sup>19</sup> Amy Goodman, "UN Special Rapporteur on Extrajudicial Killings, Philip Alston: Record AfPak Drone Attacks Under Obama May Violate International Law," *Democracy Now*, 28 October 2009, [http://www.democracynow.org/2009/10/28/un\\_special\\_rapporteur\\_on\\_extrajudicial\\_killings](http://www.democracynow.org/2009/10/28/un_special_rapporteur_on_extrajudicial_killings) (accessed 24 April 2012).

<sup>20</sup> *Legality of the Threat of Use of Nuclear Weapons* [hereinafter *Nuclear Weapons*], Advisory Opinion, in International Court of Justice Reports, 8 July 1996, 240, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95> (accessed 24 April 2012).

In the International Court of Justice's (ICJ) *Nuclear Weapon's* Advisory opinion, the court spoke of the interplay between HRL and IHL during an armed conflict. In pertinent part, the ICJ wrestled with trying to balance a person's right to life preserved under HRL with a State's right to use lethal force to kill an individual within the context of an armed conflict. Speaking on this issue, the ICJ held that, "[t]he right to not arbitrarily be deprived of life applies also in hostilities. The test for what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable to armed conflict, which is designed to regulate the conduct of hostilities...Thus, whether a particular loss of life...is to be considered an arbitrary deprivation of life can only be decided by reference to the law applicable to armed conflict and not be deduced by the Covenant itself."<sup>21</sup> As the ICJ's holding has shown, the context of the situation matters.

In peacetime, HRL is the authority that provides the framework for pursuing non-state actors that are seen as criminal suspects at large and as such, are accorded due process of law protections. Under such conditions, the use of force is limited and can be used only under extreme circumstances. In war, IHL becomes the appropriate authority, which allows a state to make the killing of an individual its primary objective. In such cases, it is not necessary for the State to provide the target with an opportunity to surrender, nor it necessary to make his capture and arrest the objective of a war time operation. While in most peacetime cases, the lethal targeting of a suspect would violate his right to life, in times of war, the State's use of lethal force to target a belligerent would not arbitrarily deprive him of his life. Thus, how one frames the relationship between the state and the individual being targeted, in large part, will decide whether the State's actions amount to

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<sup>21</sup> *Nuclear Weapons*, 240.

HRL violations, or are lawful to the extent they have been carried out against a belligerent party in the context of an armed conflict.

As evident, the context of the situation matters. As it relates to the US drone strikes in Pakistan, it is vitally important. If, as Legal Advisor Koh claims, America is in an armed conflict with militants living in Pakistan's FATA, then the drone strikes, which claim the lives of America's enemies, do not arbitrarily deprive them of their right to life because IHL becomes the legal lens that allows such actions. In contrast, if America is not involved in an armed conflict with these non-state actors, then the drone strikes, which fail to provide these suspects with an opportunity for surrender, let alone their capture and arrest, would arbitrarily deprive them of their right to life and thus, would violate HRL principles. So, is America truly involved in an armed conflict with these militants in Pakistan? To assess the nature of the conflict between America and its enemies it is necessary to look elsewhere for additional clarity.

*Jus ad bellum* laws, also known as the laws of interstate force, and IHL are the two additional legal authorities that are relevant to determining the existence of an armed conflict, which would justify US drone strikes in Pakistan. As it will be shown, the existence of an armed conflict does not depend on the assertions of the Obama Administration, which may have political reasons for asserting the existence of an armed conflict when in reality the situation does not warrant that conclusion. Instead, an armed conflict is determined based upon the objective criteria on the ground by factors that are clear to the international community. Thus, transparency is a key component when determining the existence of an armed conflict.

Transparency becomes even more important when a State, such as the US, attempts to use interstate force to target militants in a country, such as Pakistan, that is not at war with the US. Under such circumstances, *jus ad bellum* laws preclude such lethal actions unless it

can be determined that the US, as Afghanistan's agent, is responding to "armed attacks" from Pakistan's FATA. What constitutes an armed attack and when a state's use of force is justified to respond to such attacks within the territorial confines of another state falls within the purview of the laws of interstate force, and is the subject of the next section.

### **Jus ad Bellum: The Laws of Interstate Force**

*Jus ad bellum* principles are those international laws that outline when a state may resort to the use of force within the territorial confines of another State. These laws are set out by the UN legal regime, and evidence the international community's collective understanding that the territorial sovereignty of every state is sacred and as such, must be legally protected. With this in mind, the laws of interstate force were instituted favoring an international environment that embraced non-aggression and the preservation of life as its underlying tenets. Codified within the UN Charter, these laws have made peace the universal standard, and have held states accountable for violating this institutional norm.<sup>22</sup>

In pertinent part, UN Charter, Article 2(4) states that, "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>23</sup> This statement echoed the fundamental principles endorsed by the UN members as the central purpose of the organization, which was to suppress acts of aggression or other breaches of the peace that would be contrary to the intent of the UN Charter.<sup>24</sup> The sovereignty

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<sup>22</sup> Mary Ellen O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009," *Social Science Research Network*, 6 November 2009, 13, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1501144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144) (accessed 24 April 2012).

<sup>23</sup> UN Charter, art. 2(4).

<sup>24</sup> UN Charter, art. 1(1).



of nations is at stake and given the anarchic system of international politics, *jus ad bellum* laws that protect the territorial integrity of member states by limiting one's ability to resort to the use of force is seen as fundamental to the preservation of the system of international order.<sup>25</sup>

While the focus on peace is the driving force behind *jus ad bellum* principles, the laws of interstate force do allow member states, under certain exceptions, to resort to the use of interstate force. A UN Security Council Resolution (UNSCR) is the legitimate authority that can authorize a member state, or a collection of member states, the right to resort to the use of force within the territorial confines of another state.<sup>26</sup> In 2011, for example, UNSCR 1973 authorized North Atlantic Treaty Organization (NATO) forces to use all necessary means to protect Libyan civilians who had come under direct attack by the forces of the Libyan government.<sup>27</sup> This Resolution had the effect of law and allowed the international coalition of states to use lethal force to target, if necessary, Qadhafi's military forces, which reportedly had killed thousands of Libyan civilians. The authority for the UNSCR stemmed from Article 42 of the UN Charter, which allows member states to take collective military action to maintain or restore international peace and security.<sup>28</sup> A State that resorts to the use of interstate force per the direction of a UNSCR is not guilty of aggression because its actions have been justified by this legitimate authority.

The UN Charter also permits a member state to resort to the use of interstate force when it is necessary for self-defense. In pertinent part, Article 51 of the UN Charter states, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the

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<sup>25</sup> Presently, there are 192 member states, including the US, that have subscribed to the UN Charter.

<sup>26</sup> O'Connell, "Unlawful Killing with Combat Drones," 13.

<sup>27</sup> UN Security Council, "Resolution 1973 [The Situation in Libya]," 17 March 2011, *In Resolutions of the Security Council 2011* (S/RES/1973).

<sup>28</sup> UN Charter, art. 42.

Security Council has taken measures necessary to maintain international peace and security.”<sup>29</sup> The issue is one of territorial sovereignty as well as countering aggression that naturally would disrupt the peaceful stability of the states.

Under the self-defense exception, a state is lawfully permitted to use interstate force against another if it suffers or is about to suffer an armed attack from another state. Noteworthy is the fact that the assault must rise to the level of an armed attack as defined by international law.<sup>30</sup> The US State Department has stated that America’s use of interstate force is consistent with its inherent right of self-defense under the UN Charter. Whether America’s lethal actions are lawfully permitted in self-defense, however, will necessarily depend upon whether the US has suffered an armed attack in accordance with the laws of interstate force.

The factors used to assess when state action rises to the level of armed attacks on the territorial integrity of another is found under the definition of aggression.<sup>31</sup> Any invasion or attack by the armed forces of one state on another state, outside of the self-defense exception, gives rise to an armed attack and thus, justifies self-defense.<sup>32</sup> This is consistent with agency principles, which attributes liability to the principal for the acts of his agent who is under the principal’s direction and control. Under such circumstances, the armed forces of a state are the agents acting at the direction of its government, the principal, and thus, lethal force can be used in self-defense to thwart the actions of the controlling authority. The use of interstate force is justified under such circumstances because the offending state has conducted an armed attack against another State’s territory.

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<sup>29</sup> UN Charter, art. 51.

<sup>30</sup> UN Charter, art. 51.

<sup>31</sup> UN General Assembly, “Resolution 3314 [Definition of Aggression],” 14 Dec. 1974, <http://www1.umn.edu/humanrts/instate/GAres3314.html> (accessed 24 April 2012).

<sup>32</sup> UN General Assembly, “Definition of Aggression,” art. 3(a).



In contrast, the actions of non-state actors, who conduct cross border assaults from one State into the territory of another, rarely rises to the level of an armed attack. As the ICJ has held, the armed attack threshold is a very high standard, and in most instances, these territorial incursions, while violent, will not satisfy the criteria that would trigger the right for a State to respond with force in self-defense.<sup>33</sup> According to the ICJ, sporadic and low intensity attacks by non-state actors do not give rise to the level of armed attacks under Article 51.<sup>34</sup> Similarly, the question on whether a State is lawfully allowed to resort to the use of force under the self-defense exception is judged not by the total amount of non-state actor extra-territorial incursions, but instead, based upon each separate incursion.<sup>35</sup> This legal standard unquestionably dilutes the intensity of an onslaught of non-state actor attacks, which makes the Article 51 self-defense exception a non-option under most State verses non-state actor (NSA) scenarios.

A noteworthy case on this point is particularly instructive. In *Congo v. Uganda*, the ICJ had to determine whether Uganda had a legal right under the Article 51 self-defense exception to use lethal force to thwart non-state actors that were operating from the neighboring territory of the Congo. Over the course of several years, these non-state actors conducted a number of cross border raids into Uganda and killed hundreds of Ugandan citizens before retreating back to their Congo haven. Despite the horrific crimes committed by the Congolese insurgents, the ICJ found that the self-defense exception was not triggered. The ICJ found that the Congo government did not control the activities of the insurgents, nor did their perceived acquiescence rise to

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<sup>33</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, in International Court of Justice Reports, 9 July 2004, <http://www.icj-cij.org/docket/files/131/1677.pdf> (accessed 24 April 2012).

<sup>34</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice Cases, 27 June 1986, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=66&case=70&code=nus&p3=90> (accessed 24 April 2012).

<sup>35</sup> UN General Assembly, *Report of the Special Rapporteur*, 13.

the level of state sponsored terrorism, which would have triggered the self-defense option for the Ugandan government under those circumstances.<sup>36</sup> Similarly, the ICJ also found that despite the persistent and horrific nature of the attacks by the Congolese insurgents, the individual attacks themselves did not rise to the levels envisioned by the Article 51 provisions justifying a military response by the Ugandan government. As a result, Uganda was found guilty of aggression by the international authority, and was responsible for making reparations to the Congolese government.<sup>37</sup>

The *Congo* case makes clear that under most circumstances the sporadic, albeit deadly, attacks by non-state actors into the territorial confines of a neighboring state will not rise to the level of an armed attack. Instead, as one legal scholar has noted, the proper remedy for territorial incursions by non-state actors that conduct persistent but discrete cross border attacks will be through criminal prosecution under a domestic law enforcement framework.<sup>38</sup> The ICJs legal interpretation is consistent with the UN policy of ensuring that world peace is maintained by limiting a state's right to resort to the use of force, except under the most extreme circumstances.

While Article 51 limits the self-defense exception to those instances of aggression that rise to the level envisioned by the drafters of the UN Charter, it is not necessary for a State to suffer the first blow of an armed attack before it resorts to the use of force to counter the threat. As one scholar has noted, "no one ought to wait to be struck, unless he is a fool."<sup>39</sup> On the contrary, customary international law allows a state to use preemptive force to thwart an armed attack. A preemptive strike

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<sup>36</sup> *DEMOCRATIC REPUBLIC OF THE CONGO v. UGANDA*, in INTERNATIONAL COURT OF JUSTICE REPORTS OF JUDGMENTS, ADVISORY OPINIONS, AND ORDERS, 2005, paras. 147, 301, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=co&case=116&k=51> (accessed 24 April 2012).

<sup>37</sup> O'Connell, "Unlawful Killing with Combat Drones," 15.

<sup>38</sup> O'Connell, "Unlawful Killing with Combat Drones," 15.

<sup>39</sup> Jenks, "Law from Above," 659.

under a claim of self-defense, however, requires that the State follow strict guidelines and those indicators must be transparent to the international community so that this legal provision is not abused.

In 1841, a noteworthy court case articulated the legal standard that allows a state to use preemptive military force in self-defense. During the 19<sup>th</sup> century, the British attacked an American steamship, the *Caroline*, which had been intermittently used to support a Canadian insurrection that threatened British rule. In the landmark case, then Secretary of State Daniel Webster articulated what has become known as the *Caroline* test in regards to a claim of preemptive self-defense. Under the legal standard, in order for a state to claim preemptive self-defense as a first strike option, Webster stated that the, “necessity of that self-defense [must be] instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”<sup>40</sup> The conditions of imminence and necessity regarding the preemptive use of force in self-defense have been adopted as customary practice in the international community and are supported by the weight of the scholarship still in effect today.

While the requirements of the *Caroline* test allow a state a preemptive first strike self-defense option under Article 51, it is essential that its requirements be satisfied to ensure the legitimacy of the State’s use of force. An armed attack from another State, or by a group of non-state actors, that is anticipated but not imminent does not satisfy the requirements of the preemptive use of force, and thus, would be a violation of international law.<sup>41</sup> A state that used lethal force against a potential threat that was not imminent would be unlawful because the *Caroline* conditions have not been met, and the self-defense exception does not authorize the preventive use of force.<sup>42</sup>

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<sup>40</sup> *The Caroline*, 2 J. Moore, Dig. of Int’l L. 209, 412 (1906).

<sup>41</sup> Jenks, “Law from Above,” 658.

<sup>42</sup> Chris Jenks, “Law from Above,” 658; Lord Goldsmith, *Iraq: Resolution 1441*, Memo to the Prime Minister, 7 March 2002, <http://image.guardian.co.uk/sys-files/Guadian/documents/2005/04/28/legal.pdf> (accessed 25 February 2012).

The UNSCR and a state's right of self-defense lawfully permit a state to resort to the use of lethal force to counter foreign aggression. In addition to these exceptions, a host state may also consent to another state's use of force within its territory, and this is not controversial.<sup>43</sup> A host nation's consent, however, only makes moot any breach of sovereignty claim that could have been brought but for the consent.

While the law of interstate force protects the sovereignty of nations, HRL and IHL continue to protect the individual from the unlawful deprivation of life. Consequently, even with another State's consent, it still must be determined whether an armed conflict exists, and if so, who may be targeted, when, and on what basis targeted killings can take place in accordance with international law. IHL can provide clarity to these answers and is thus, the legal guidance used to assess the nature of hostilities and the laws of war. It should be noted, however, that HRL obligations continue to inform the legal analysis under the laws of armed conflict. The persistent presence of HRL, even in war, rounds out a mixed mode legal paradigm for determining whether America's targeted killing operations in Pakistan's FATA comply with international law.

### **International Humanitarian Law**

IHL, also known as the Law of Armed Conflict (LOAC), are those international laws that outline the criteria used to determine the existence of an armed conflict, and how the use of force will be used once engaged in armed hostilities.<sup>44</sup> The Hague Convention, the Geneva Conventions (GC), and its Additional Protocols (AP) are original source law, which speak to the rules of war.<sup>45</sup> In addition, the International Committee of the Red Cross (ICRC) provides commentary on the

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<sup>43</sup> UN General Assembly, *Report of the Special Rapporteur*, 12.

<sup>44</sup> Howard M. Hensel, *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force*, (Burlington, VT: Ashgate, 2005), 25-26.

<sup>45</sup> While the US has not ratified the Additional Protocols it has as a matter of policy agreed to abide by them.

application of the rules of war and is considered as persuasive authority by the international community. These laws have been codified by State agreement where their violations are frequently adjudicated by the ICJ, and the International Criminal Court (ICC).

While the laws of interstate force were designed to protect State sovereignty, the LOAC are designed to protect the innocent by regulating how the use of force will be used during armed conflict. This guiding tenet is the result of a HRL carryover, which ensures that the state, even in wartime, does not arbitrarily deprive individuals of their right to life. As it has been shown, what constitutes an arbitrary deprivation of life in times of peace, is not going to yield the same result in times of war. Thus, it is necessary to evaluate the criteria used to assess the existence of an armed conflict, to determine the lawfulness of US drone strikes in Pakistan's FATA.

### **The Existence of an Armed Conflict**

The factors used for determining the existence of an armed conflict are based upon the objective determinations on the ground. Its existence is not based upon the subjective assertions of a state, including the US, which may have political reasons for asserting that an armed conflict exists when that may not be the case.<sup>46</sup>

Historically, states have tended to shy away from acknowledging the existence of an armed conflict with non-state actors out of concern that such recognition would give legitimacy to an ad-hoc group of terrorists who, under peacetime conditions, would have been treated as criminals by domestic law enforcement. Similarly, states have also refrained from attributing belligerent status to non-state actors out of fear of signaling to rivals a weakness in state security. Such an acknowledgment could precipitate a larger conflict, something most

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<sup>46</sup> UN General Assembly, *Report of the Special Rapporteur*, 15.

states would wish to avoid. The United Kingdom, for example, took a peacetime approach to dealing with the Irish Republican Army (IRA), as did Russia with its dealings with the separatists in Chechnya.<sup>47</sup> In both of these instances, the State authority viewed these bad actors as criminals through the lens of a domestic law enforcement framework. Thus, America's armed conflict assertion is a legal interpretation that stands in stark contrast to the historical precedent established by the international community.

According to IHL, there are two types of armed conflict: international and non-international armed conflict. An international armed conflict (IAC) exists if there are, "...[a]ny differences [that] arise between two States, [which] lead to the intervention of armed forces."<sup>48</sup> There is no threshold requirement for the scale and duration of military hostilities between both sides before an IAC is said to exist.<sup>49</sup> In addition, no declaration of war is required for an IAC to exist. Since by definition an IAC arises between two States, an IAC cannot exist between a State and group of non-state actors.<sup>50</sup> Thus, if there is an armed conflict between a State and a group of non-state actors it will be because the threshold requirements have been met for a non-international armed conflict (NIAC).

The objective requirements<sup>51</sup> that speak to the existence of a NIAC stem from both the Geneva Conventions and its Additional Protocols. In

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<sup>47</sup> UN General Assembly, *Report of the Special Rapporteur*, 15.

<sup>48</sup> Geneva Conventions I to IV, Common Art. 2(1).

<sup>49</sup> United Nations, *Report of the Special Rapporteur*, 16.

<sup>50</sup> See *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, 548 U.S. 557 (2006).

<sup>51</sup> Another factor that provides evidence that hostile engagements between a State and non-state actors has risen to the level of an armed conflict relates to the group's ability to ensure that its members adhere to the laws of war that specify how the war is conducted and by who and to what extent lethal force can be used against the State adversary. This criteria is consistent with the onus that is placed on a Party to the conflict to ensure the laws of war are followed and ensures that a process is in place to deal with violators that may shortcut the legal requirements imposed by the international system on belligerents. The criteria also reflects the notion that international law and its requirements are placed on those states or governing organizations that possess a certain amount of legitimacy. A group of non-state actors that fails to enforce these rules against its fighting forces and/or has no effective control of its organizational structure to ensure compliance, according to international law, undercuts its ability to be recognized as a legitimate party to a



general, for a group of non-state actors to be recognized as a belligerent in a NIAC, it must have the makings of an organized armed group under IHL. In this regard, it must have an organizational structure, it must have a territorial nexus insofar as it can seize, hold and control territory, and the degree of fighting by the organized armed group must be of a sustained and concerted character that there be no doubt that an armed conflict exists.<sup>52</sup> These criteria distinguish organized armed groups in a NIAC from armed gangs that while criminal are not belligerents involved in an armed conflict.

### **The Organized Armed Group**

In a NIAC, the State party must be engaged in an armed conflict with an organized armed group. In this regard, the non-state actors must be organized in a way that provides for traditional command and control of its subordinates. The collective actions of the group at the tactical, operational and strategic levels of war should reflect the higher aims that match the leadership's objectives.<sup>53</sup> The organization should have a command hierarchy that identifies its central political and military leaders charged with the strategic vision of the group. The organization should also have operational forces that are capable of sequencing attacks under the guidance of the central leadership, as well as foot soldiers that are cable to carrying out senior officer directives toward their tactical assignments.<sup>54</sup> While not entirely dispositive, organization is a key factor to be used to determine whether the group of non-state actors has elevated itself to belligerent status.

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NIAC. Another recognized factor that may contribute to a group of non-state actors rising to the level of a party to the conflict may be that the international community has identified the dispute as an armed conflict and the UNSC has adopted Resolutions for dealing with the situation.

<sup>52</sup> Geneva Conventions, Article 3; Additional Protocols II.

<sup>53</sup> Geneva Conventions, Common Article 3, *Conflicts not of an International Character*, 12 August 1949, <http://www.icrc.org/ihl.nsf/COM/375-590006?OpenDocument> (accessed 24 April 2012).

<sup>54</sup> The organization should steer the collective actions of the group to achieve its higher political aims.

A NIAC also requires that the group of non-state actors have a territorial nexus insofar as it must be contesting the control of the territory of the State within which it is fighting.<sup>55</sup> This criteria reflects consistency with the international norm that the legitimacy of a state stems from its ability to govern its own territories. Loyalty of the local population is a key indicator of the level of state control exhibited by the armed group. An armed group that is capable of supplying traditional government functions to the population in a contested area, has attained a level of legitimacy, which can be attributed to a belligerent in a NIAC.

Finally, the fighting of the armed group must be of a sustained and concerted character before belligerent status is attributed to these non-state actors. According to IHL, isolated or sporadic acts of violence, are social disturbances and do not meet the intensity threshold envisioned under international law for organized armed groups.<sup>56</sup> Under such circumstances, while the actions of these militants are likely criminal, they do not rise to the level required to allow the state to use lethal force, as opposed to due process, to decide the fate of these bad actors. Instead, the sustained and concerted character of the group should leave no doubt that an armed conflict exists between the State and the insurgents.

The existence of an armed conflict is critical to determining the lawfulness of a State's use of lethal force. The importance of this inquiry in NIAC should not be underestimated. In a NIAC, a group of non-state actors that is organized, is capable of seizing and controlling territory, and shows sustained and concerted levels of fighting, is an organized armed group involved in a NIAC. As a belligerent involved in an armed conflict, the organized armed group can be targeted directly by the State with lethal force, provided the rules of war have been satisfied. The *jus*

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<sup>55</sup> Geneva Conventions, Additional Protocol II, Article 1, *Material Field of Application*, 8 June 1977, <http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument> (accessed 24 April 2012).

<sup>56</sup> Additional Protocol II, Art. 1.



*in bello* principles of necessity, distinction, proportionality, and humanity are the subject of the next section.

### ***Jus in Bello: The Laws of Armed Conflict***

Just as IHL provides the criteria used to determine the existence of an armed conflict, the LOAC is also the legal framework that specifies how an armed conflict will be fought, by who, and under what circumstances. These rules of war were codified by the international community, which recognized that while war is a relatively chaotic affair involving violence, there are limits to the use of lethal force against an adversary. The *jus in bello* principles of necessity, distinction, proportionality, and humanity act as regulators of the violence in armed conflict to ensure that the use of force stays within legal bounds, and more importantly, does not arbitrarily deprive anyone their right to life.<sup>57</sup>

The principles of IHL are to be applied equally across every armed conflict regardless of a Party's stated reasons for going to war. Recently, attempts have been made to claim that a nation's self-defense right, in extreme circumstances, can justify disregarding the principles of war when the state's survival is at stake.<sup>58</sup> This reading of the law, however, is without precedent. Such interpretation would allow any state to inject a sliding scale of "rightness" into the rules of war, which would erode the law's intent, which is to prevent the arbitrary deprivation of life during armed conflict by establishing resolute rules of war.<sup>59</sup> A state's right of self-defense is not limitless and any contrary claim is an unlawful

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<sup>57</sup> See generally, Howard M. Hensel, *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force*, (Burlington, VT: Ashgate, 2005).

<sup>58</sup> Kenneth Anderson, "Targeted Killing in US Counterterrorism Strategy and Law," *Social Science Research Network*, 11 May 2009, 28-37, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1415070&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415070&download=yes) (accessed 24 April 2012).

<sup>59</sup> UN General Assembly, *Report of the Special Rapporteur*, 14.

expansion of international law that is not supported by nearly 100 years of legal scholarship and practice.<sup>60</sup>

Instead, *jus in bello* principles provide each belligerent with objective standards for measuring the use of force within an armed conflict. These fundamental tenets bring confidence to both parties knowing that adherence to the rules of war is in the best interests of all sides where reciprocal behavior has its benefits. While one side of the armed conflict may be encouraged to deviate from the rules of war based upon the short term gain, in most circumstances, the Party's long term legitimacy is better served by adhering to the LOAC.

Necessity, distinction, proportionality, and humanity, seek to balance the needs of the military campaign with protecting victims from the unlawful use of lethal force during armed conflict.<sup>61</sup> At one end of the lethal force spectrum is the principle of necessity, and at the other is the principle of humanity. These two principles act as bookends that frame the lawfulness inquiry once it has been determined that an armed conflict exists, and a potential military objective has been identified for lethal targeting. Between necessity and humanity, are the principles of distinction and proportionality. In general, these principles prevent the arbitrary use of lethal force against civilians who have been internationally recognized as a protected class in an armed conflict. These principles place a requirement on the proponent seeking to use lethal force to satisfy built-in objective safeguards that are designed to protect the lives of civilians before targeting with lethal force. All of the principles must be satisfied in their entirety to satisfy the lawfulness

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<sup>60</sup> Additional Protocol I, art. 35(1), "In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited."

<sup>61</sup> International Committee of the Red Cross (ICRC), "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law [hereinafter Direct Participation in Hostilities]," *Reports and Documents*, Vol. 90, No. 872, 2008, 11, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (accessed 24 April 2012).

inquiry. In addition, the rules of war apply equally in both IAC and NIAC.<sup>62</sup>

### **Necessity**

Under customary IHL, necessity refers to military necessity and governs the use of force to the extent needed to attain a valid military objective.<sup>63</sup> It is the first step toward ensuring that in an armed conflict, the military objective is the driving force behind deciding whether it is necessary to use lethal force against a given target.

The principle of necessity constrains the behavior of the fighting forces to ensure that lethal force is not used against targets that are not valid military objectives. While a belligerent's military objective may vary from one to another, traditional targets, for example, include enemy combatants, enemy compounds and structures, an adversary's command and control, and an enemy's supply depots. Inherent in this principle of armed conflict is the understanding that force should only be used as a means to achieve a larger strategic objective, and not as an end in itself.<sup>64</sup> Thus, tight command and control of lethal targeting as well as transparency is essential to ensuring that force is not used unnecessarily in armed conflict.

### **Distinction**

Distinction is a fundamental *jus in bello* principle that guards against the arbitrary deprivation of a civilian's right to life. At the heart of this tenet lies international agreement that civilians are not proper military targets under any circumstances and as such, they should be legally protected with safeguards that prevent them from being targeted

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<sup>62</sup> O'Connell, "Unlawful Killing with Combat Drones," 21.

<sup>63</sup> Françoise Hampson, "Military Necessity," *Crimes of War*, <http://www.crimesofwar.org/a-z-guide/military-necessity/> (accessed 24 April 2012).

<sup>64</sup> Hampson, "Military Necessity."

directly with lethal force during armed conflict.<sup>65</sup> This wartime principle ensures that its offenders are held accountable for war crimes should the principle be violated by a Party to the action. Consequently, the importance of ensuring compliance with this principle should not be overlooked.

Distinction requires that, “[t]he parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”<sup>66</sup> Under international law, if a person is a combatant then targeted killing operations can be carried out against him directly regardless of the task he is currently performing.<sup>67</sup> This would include, for example, lawfully targeting a combatant who is sleeping in his quarters and far removed from armed hostilities. The combatant category matters, and is vitally important to distinguishing those individuals that can be targeted directly from those civilians that cannot.

IHL is clear that the distinction principle, which protects civilians, must be read in conjunction with other legal precedent that states that a civilian is protected until such time as he directly participates in hostilities (DPH).<sup>68</sup> This notion stems from the understanding that civilians must not be allowed to hide behind their protected status while taking up arms themselves and using lethal force against a belligerent party. Thus, the law holds that while a civilian DPH he loses his protective status and becomes an unlawful combatant, which can be targeted directly with lethal force.<sup>69</sup> When he ceases to DPH, the civilian

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<sup>65</sup> ICRC, “Direct Participation in Hostilities,” 11.

<sup>66</sup> International Committee of the Red Cross, “Rule 1. The Principle of Distinction between Civilians and Combatants,” *Customary IHL*, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1) (accessed 24 April 2012).

<sup>67</sup> International Committee of the Red Cross, “Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel,” *Customary IHL*, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter1\\_rule3](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule3) (accessed 24 April 2012); International Committee of the Red Cross, *The relevance of IHL in the context of terrorism*, 1 January 2011, <http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm> (accessed 24 April 2012).

<sup>68</sup> ICRC, “Rule 1,” Additional Protocol I, art. 51(3); Additional Protocol II, art. 13(3).

<sup>69</sup> ICRC, “Direct Participation in Hostilities,” 70.

regains his protected status, and thus, can no longer be targeted with lethal force.<sup>70</sup>

In NIAC, the distinction principle has been the subject of much debate. States have found it extremely difficult to conduct military operations against an organized armed group that has made the strategic choice to live among the civilian population, to wear civilian clothing, and to conceal their identity from their adversary. In contrast to traditional military personnel, these non-state actors frequently do not wear uniforms, or evidence any fixed distinctive signs that would provide proof of their association with the organized armed group.<sup>71</sup> Thus, the challenge for the State in NIAC is being able to lawfully prosecute a war campaign in good faith that readily distinguishes between civilians that DPH and those that do not. According to the ICRC, however, if there is any doubt as to whether the civilian's activities qualify, "it must be presumed that the general rule of civilian protection applies and that [his] conduct does not amount to DPH."<sup>72</sup>

Recently, the ICRC published guidelines, which outlined a new category of unlawful combatants in NIAC. The continuous combat function (CCF) designates those non-state actors that have shown intent to form a continuous affiliation with the organized armed group.<sup>73</sup> Under the ICRC interpretation, non-state actors that perform a CCF can be targeted directly with lethal force at all times because by their actions

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<sup>70</sup> ICRC, "Direct Participation in Hostilities," 70.

<sup>71</sup> ICRC, "Direct Participation in Hostilities," 32-3.

<sup>72</sup> ICRC, "Direct Participation in Hostilities," 76.

<sup>73</sup> As evidence of the CCF, the ICRC has said that civilians that regularly engage in the preparation, execution, or command of acts or operations amounting to DPH have assumed membership in this unlawful combatant category. Similarly, an individual that is recruited, trained, and equipped by an organized armed group of non-state actors can be considered to be in a continuous combat function even if they have yet to perform a hostile act. The continuous combat function may be openly expressed by members by the wearing of uniforms, and carrying of certain weapons. It may also be determined on the basis of conclusive behavior under such circumstances that it is clear to an objective eye that the person has assumed a continuous function as opposed to a spontaneous, sporadic or temporary role assumed for the duration of the NIAC. In case of doubt as to whether the civilian's activities qualify for the continuous combat function, it should be assumed that the general protective presumption precludes targeting these people with lethal force.

and intent they have compromised their civilian protection and have demonstrated their permanent alignment with the belligerent party.<sup>74</sup>

With this new grouping there is a natural temptation to lump civilians, who may have previously DPH, into the CCF category, because it takes the safety off the target vetting process. IHL, however, cautions against this. As the ICRC has noted, membership in the CCF is not based upon shared ideology, family ties, motivations, or by specific acts by civilians that at one time may have DPH.<sup>75</sup> Instead, the CCF category has been designated to target those civilians that have formed a lasting integration into the organized armed group and not civilians that may periodically DPH.

It should be noted that DPH is not measured by a civilian's affiliation, but instead, refers to the specific *act* carried out by the individual as part of the conduct of hostilities between parties to an armed conflict.<sup>76</sup> In contrast to the CCF, which has attributed membership to someone based upon their permanent intent to align themselves with the organized armed group, the civilian that DPH does so only on a temporary basis and such hostile activity generally has a short duration.<sup>77</sup> It may be tempting for a State to attribute a continuous intent to carry out hostile actions in the future to civilians that have separately but periodically DPH. The ICRC, however, has stated that such speculation about future intent would undermine the distinction principle and thereby, facilitate arbitrary and erroneous attacks against civilians.<sup>78</sup> Instead, the correct analysis is focused on the individual hostile act and not based upon the membership of specific organization when determining whether a civilian is DPH and subject to lethal targeting.

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<sup>74</sup> ICRC, "Direct Participation in Hostilities," 33-5.

<sup>75</sup> ICRC, "Direct Participation in Hostilities," 33.

<sup>76</sup> ICRC, "Direct Participation in Hostilities," 46.

<sup>77</sup> ICRC, "Direct Participation in Hostilities," 74.

<sup>78</sup> ICRC, "Direct Participation in Hostilities," 45.

IHL sets a three part inquiry that must be satisfied before a civilian can be said to be DPH. As it relates to the act, the ICRC states the, “...specific act must be likely to adversely affect the military operations or military capacity or party to an armed conflict.”<sup>79</sup> There must also be a direct link between the act and the expected result from that act.<sup>80</sup> In other words, DPH requires that a civilian’s actions be the proximate cause of the damages expected from his hostile act.<sup>81</sup> Acts that are characterized as indirect are not specific enough to satisfy the DPH standard. Finally, the acts must be performed for the sole benefit of one of the belligerent parties. Acts that are not carried out for the purpose of supporting a wider aim of a party to the armed conflict, while criminal, fail to meet the threshold requirement for DPH.<sup>82</sup>

IHL provides several examples that fall short of a civilian DPH. Civilian conduct that builds-up or maintains the fighting capacity of the organized armed ground would not meet the threshold requirements for DPH. In this regard, the financing, production and transportation of weapons and equipment for the organized armed group, does not evidence DPH because these acts are examples of indirect civilian participation.<sup>83</sup> IHL also states that civilians that recruit, train, finance, and indoctrinate others, absent additional proof of intention, cannot be said to be DPH. While such support roles increases the likelihood that these civilians may be harmed through incidental targeting of the armed forces of the organized group, these instances do not by themselves evidence DPH.<sup>84</sup> Thus, these individuals maintain their protected status as civilians, and as such, cannot be targeted directly with lethal force.

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<sup>79</sup> ICRC, “Direct Participation in Hostilities,” 47.

<sup>80</sup> ICRC, “Direct Participation in Hostilities,” 52.

<sup>81</sup> ICRC, “Direct Participation in Hostilities,” 51.

<sup>82</sup> ICRC, “Direct Participation in Hostilities,” 46.

<sup>83</sup> ICRC, “Direct Participation in Hostilities,” 53, 66.

<sup>84</sup> ICRC, “Direct Participation in Hostilities,” 66-7.



## Proportionality

Proportionality, according to the ICRC, prohibits a state from, “launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>85</sup> The proportionality principle recognizes that in the best of circumstances, there will be a loss of civilian life at the hands of military forces during armed conflict. Therefore, not all civilian deaths during armed conflict are rendered illegal by international law. Only the incidental deaths that are excessive in relation to the concrete military objective are per se unlawful.

The Rome Statute, which governs the ICC’s jurisdiction and authority to investigate war crimes, also articulates a similar proportionality standard governing the use of lethal force during armed conflict. The rule for proportionality was articulated by Luis Moreno-Ocampo, the Chief Prosecutor of the ICC, during his investigation of war crimes following the routing of Iraqi forces from Kuwait by coalition forces during Desert Storm in 1991. In the Chief Prosecutor’s words, under the Rome Statute, “a [war] crime occurs...if an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage.”<sup>86</sup> Incorporating the fundamental importance of proportionality into the penal system of the ICC, Luis Moreno-Ocampo makes clear that a violation of the proportionality principle is the basis of a war crime and subject to prosecution.

The key to understanding the proportionality principle is determining what constitutes an *excessive* loss of incidental civilian lives

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<sup>85</sup> International Committee of the Red Cross, “Rule 14. Proportionality in Attack,” *Customary IHL*, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14) (accessed 24 April 2012).

<sup>86</sup> Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, to The Hague, letter, 9 February 2006, 5, [http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) (accessed 25 April 2012).

vis-à-vis the direct and concrete military objective. Dr. Barry Feinstein, a leading international scholar at Rutgers University, has articulated an analytical framework that can help bring clarity to this inquiry. The first step is to objectively and accurately conduct a casualty assessment to determine the incidental loss of civilian lives during a targeted killing operation.<sup>87</sup> There is some difficulty with determining the veracity of casualty claims during armed conflicts because each side has a tendency to either inflate or deflate the rate depending on perspective. The law is clear, however, that a good faith attempt should be made by the State to ensure that an accurate casualty count is assessed and made transparent enough so that the figures can be credibly scrutinized. Anything less would undermine the principle's original intent, which was made to protect civilians from the arbitrary use of lethal force in armed conflict. After an accurate casualty count has been completed, the State should then compare the civilian casualty rates with the military advantage attained to determine if the loss of incidental civilian lives was excessive.

In NIACs, the scale of acceptable civilian losses seems to diminish when the concrete military advantage expected is only tactical as opposed to strategic in effect. Indeed, targeting foot soldiers while killing a high number of civilians in the process, does not likely comport with the proportionality principle. In contrast, killing a senior leader of an organized armed group, while claiming a number of civilian casualties, may be acceptable, however unpalatable, if the leader's death was strategically important. Despite the challenges posed in assessing the proportionality principle, IHL and the Rome Statute require that a State consider the incidental loss of civilian lives prior to engaging a target with lethal force.

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<sup>87</sup> Barry A. Feinstein, "Proportionality and War Crimes in Gaza under the Laws of Armed Conflict," *Rutgers Law Record*, Fall 2009, 245, [http://lawrecord.com/files/36\\_Rutgers\\_L\\_Rec\\_224.pdf](http://lawrecord.com/files/36_Rutgers_L_Rec_224.pdf) (accessed 25 April 2012).

## **Humanity**

Finally, the humanity principle rounds out the rules of war, and serves to check the necessity of using lethal force during an armed conflict. While the principles of distinction and proportionality were instituted to deter the arbitrary deprivation of civilian lives, the humanity principle was instituted to deter the arbitrary deprivation of a belligerent's life. In this regard, the humanity principle is a carry-over from HRL. While the humanity principle may not override the acceptance of the other *jus in bello* principles once a lawful target has been identified, humanity still requires that states support operations in favor of preserving life as opposed to using lethal force as a necessary in all circumstances during an armed conflict.<sup>88</sup>

The humanity principle reflects an understanding that even in war there are times during military operations that the necessity of using lethal force should be tempered by tenets underlying peacetime constraint. Circumstances that should restrain the use of force are evident in cases where the State has effective control of the circumstances and the area in which military operation is being conducted.<sup>89</sup> As the ICRC states, "In classic large scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of the IHL...In practice, [humanity] considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts." Such

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<sup>88</sup> O'Connell, "Unlawful Killing with Combat Drones," 24; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, ICJ Reports, 9 July 2004, sects. 106-113.

<sup>89</sup> *The Public Committee Against Torture et al. v. The Government of Israel et al.*, Judgment of the Israeli High Court of Justice, 13 December 2006, sect. 40.

circumstances become decisive, especially in NIAC, where the State's armed forces are frequently operating in environments comparable to peacetime policing.<sup>90</sup>

It is clear from the commentary that control should be the guiding factor as to whether capture, as opposed to killing, should be the objective of the military operations in close call situations. Take for example, the following illustration. An insurgent from an organized armed group decides to visit relatives in a city firmly controlled by military forces, but under the circumstances, peacetime policing is capable of being an effective deterrent to the outbreak of hostilities. The insurgent happens to be a high ranking al-Qaeda operative, and after a careful analysis, it is determined that lethal force may be lawfully employed against him. Despite the person's involvement in a broader armed conflict, under such circumstances it seems clear that his capture as opposed to his killing should be the objective of the operation. While operating forces can hardly be asked to assume the additional risks to themselves and others in effecting an arrest, according to IHL, it would defy the notions of humanity to kill an individual without providing him with the opportunity to surrender under such circumstances.<sup>91</sup> In other words, if the armed forces are able to attain the same military advantage through multiple means, the lesser evil should be the one chosen. In this regard, the humanity principle is a carry-over from HRL, which has been instituted to ensure that even an adversary's life is not arbitrarily deprived by a State's use of lethal force during armed conflict.

### **Summary:**

As it has been shown, there are three international legal paradigms triggered by American drone strikes in Pakistan. HRL, the law of

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<sup>90</sup> ICRC, "Direct Participation in Hostilities," 80-1.

<sup>91</sup> ICRC, "Direct Participation in Hostilities," 82.

interstate force, and IHL must all be understood and analyzed before a cogent analysis can take place of the lawfulness of the US drone strikes.

As evident, at the heart of HRL is the understanding that everyone has an inalienable right to life that shall not be arbitrarily deprived. This right has been found fundamental to every human being, even those living in Pakistan's FATA. Codified within the ICCPR, the right to life has been recognized as sacred by the international community. HRL has been developed to protect the right to life from those states that risk trampling on the law's protections.

As it has been shown, what amounts to an arbitrary deprivation of life necessarily depends on the context of the situation. In times of peace, HRL is the legal lens for determining the lawful basis that describes when the use of force is allowed and to what extent. In peacetime enforcement, lethal force against an individual is only authorized to the extent that it is necessary to protect another's life, which is under immediate life-threatening harm. This limitation on the use of force in peacetime has been recognized by the international community by its codification in the *United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials*.

In times of armed conflict, however, IHL guides the analysis for determining what constitutes an arbitrary deprivation of life. In contrast to peacetime enforcement, in times of war, a targeted killing operation that uses lethal force directly against an individual as a positive objective of the operation is lawful provided the rules of war have been satisfied. In peacetime enforcement, a targeted killing operation is always unlawful because under this legal framework, a suspect's capture and arrest are the sole aims of the operation. Thus, the situation on the ground matters.

As evident, the law of interstate force also matters insofar as it forbids the use of force in the territorial confines of another state except under the most extreme circumstances. Underlying the fundamental

principles of this legal framework is an international understanding that peace as opposed war should be the international status quo. Any less standard would make the use of force the rule as opposed to the exception, and would thus, violate the legal tenets behind the law. A state may resort to the use of force pursuant to UNSCR, or in the alternative, consistent with its inherent right of self-defense. As it has been shown, a state's self-defense right is triggered provided the state has suffered or has about to suffer an "armed attack" on its territorial sovereignty. What constitutes an armed attack necessarily depends on who is doing the attacking.

As the law has held, a group of non-state actors that make attacks within the territorial confines of another country will rarely satisfy the armed attack criteria. This is consistent with years of legal precedent, which defers to criminal law enforcement mechanisms for dealing with violent armed gangs that while criminal, do not rise to level of a belligerent party capable of being targeted with lethal force. The self-defense exception does permit the harmed state to use lethal force to target the state responsible for an armed attack. If the host state, however, does not control the violent actions of aggressive non-state actors, a state's self-defense right does not trigger a right to resort the use of lethal force.

As it has been shown, IHL provides the legal analysis for determining the existence of an armed conflict. It also articulates the principles of war that will guide how the use of force will be implemented in the confines of an armed conflict. As evident, in the case of a NIAC, an armed conflict exists between a State and an armed group of non-state actors if the group is organized, has a territorial nexus insofar as it is capable of holding and controlling territory, and the group exhibits sustained and concerted levels of fighting leaving no doubt that an armed conflict exists between the two parties. If the armed group does not evidence these characteristics of a belligerent, then it is deemed a

criminal gang, and while violent, is not lawfully allowed to be targeted with lethal force according to international law.

Once it has been determined that an armed conflict exists, the rules of war apply and determine how the use of force will be used within a battlefield context. As it has been shown, necessity refers to military necessity, and ensures that lethal force is only being used to the extent necessary to achieve a valid military objective. It has been suggested that this includes only those tactical military objectives that are nested within a broader and much larger strategic objective. Anything less would be a violation of the necessity principle of war.

The distinction principle seeks to prevent the targeting of civilians during armed conflict. It is understood that this rule is to be read with the understanding that the rule protects civilians until such time as they DPH. NIAC pose challenges for states wishing to lethally target non-state actors, which use the civilian landscape, and demographic cover to hide their true identities and intentions. While separating civilians from belligerents is difficult under such circumstances, the distinction principle requires that if there is any doubt as to the identity of the person being targeted, the State must presume that he is a civilian and thus, protected from being targeted with lethal force.

The proportionality principle seeks to instill further protections to the civilian population by lawfully permitting lethal targeting of only those direct and concrete military objectives that do not result in excessive incidental civilian casualties. As it has been suggested, the proportionality principle may require targeting only high level enemy combatants if it is anticipated that there will be any incidental loss of civilian lives. Targeting low-level foot soldiers as a matter of weekly routine while killing the same amount of civilians in the process would be a violation of this principle of war.

Finally, the humanity principle recognizes that even in war there are certain circumstances that may present themselves, which makes



the belligerent's capture possible without exposing the State to additional risk. At the heart of the humanity principle lies the understanding that if there are two means of achieving the State's goal of attaining a military objective, should not the lesser evil be chosen if it can secure the same result? Any less of a standard would make the use of force the necessary end in all circumstances, which would defy the notions of humanity if allowed free reign in every situation. The humanity principle rounds out the principles, which ensure that even in armed conflict there are still limits to the use of force.



## **Chapter 2**

### **Analyzing the Lawfulness of US Drone Strikes in Pakistan Through the International Legal Lenses**

The intent of this chapter is to determine whether America's targeted killing operations against AQ, the Taliban and its associated forces complies with international law. Using the CIA's targeted killing operations in Pakistan as a backdrop, the lawfulness of drone strikes will be evaluated through the lens of the three legal paradigms, HRL, the law of interstate force, and IHL. The evidence will show that American drones strikes are unlawful because they violate all three legal frameworks.

#### **Post 9/11**

Following the 9/11 attacks, the Bush Administration sought to hold the country or countries that supported AQ directly responsible for the terrorists' actions. After receiving Congress' Authorization of the Use of Military Force (AUMF), the US quickly sought a UNSCR that condemned the terrorists' attacks and authorized the use of military force in accordance with its inherent right of self-defense guaranteed by the UN Charter.<sup>1</sup> UNSCR 1368 condemned the 9/11 attacks as threats to international peace, and the Security Council expressed its readiness to take all necessary steps to respond, but it fell short of attributing to any State responsibility for the terrorists' actions.<sup>2</sup> Shortly thereafter, however, the FBI and CIA were able to determine that Afghanistan's Taliban government was providing support and sanctuary for AQ operatives. After this discovery, and in nearly a month's time, conventional forces led by an international coalition toppled the Taliban

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<sup>1</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>2</sup> UN Security Council, "Resolution 1368 [Threats to international peace and security caused by terrorist acts]," *In Resolutions of the Security Council 2001*, 12 September 2001, <http://daccess-ddsny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement.htm> (accessed 24 April 2012).

government forcing it to retreat into the Afghan countryside where it still remains an active influencer of the local population.

Since then a kinetic military operation in Afghanistan that targeted Taliban strongholds was able to push the Taliban and AQ extremists to the territorial limits of Afghanistan and beyond into the rugged and unforgiving terrain of the Federally Administered Tribal Areas (FATA) of northwestern Pakistan.<sup>3</sup> With mountain peaks over 12,000 feet high and an Afghanistan-Pakistan (AfPak) border over 373 miles along, this unforgiving terrain has provided sanctuary to Taliban and AQ fighters who have staged their operations from this new cross border hideaway.<sup>4</sup> The FATA consists of approximately 3,000 rural villages with a population of three million with 60% of it living below the national poverty line.<sup>5</sup> Most of the villagers are farmers and with a 17% overall literacy rate, economic improvement in the lives of the villagers does not hold much future.<sup>6</sup> The presence of the Taliban and AQ operatives only adds to the population's instability, and Pakistan's inability to ensure a vigilant presence has allowed these bad actors to put down roots in these areas. The mountainous terrain is a natural impediment to Pakistani law enforcement, and the villagers in the FATA provide demographic cover for Taliban and AQ fighters who are able to blend in with the population and avoid detection. With the war in Afghanistan, and the rugged sanctuary for the Taliban and AQ in Pakistan, the US has consistently used drone strikes to target these non-state actors.

### **American Policy on Targeted Killing Operations**

Current US policy on its drone strikes in Pakistan has been a tightly guarded secret given the ongoing covert action. In recent times,

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<sup>3</sup> Carin Zissis and Jayshree Bajoria, "Pakistan's Tribal Areas," *Council on Foreign Relations*, 26 October 2007, <http://www.cfr.org/pakistan/pakistans-tribal-areas/p11973> (accessed April 15, 2012).

<sup>4</sup> "Federally Administered Tribal Areas [hereinafter FATA]," *Global Security.Org*, <http://www.globalsecurity.org/military/world/pakistan/fata.htm>, (accessed April 15, 2012).

<sup>5</sup> "FATA."

<sup>6</sup> "FATA."

however, the Obama Administration has made efforts to make more transparent the steps taken to ensure that its actions are lawful. Legal Advisor Koh's speech at the annual meeting of the American Society of International Law in March 2010 demonstrated this effort. There, the State Department spokesman claimed of America's right to resort to the use of force that, "...the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right of self-defense under international law."<sup>7</sup> On the subject of targeting a particular individual with lethal force, Koh stated, "...[that] whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of the states to suppress the threat the target poses."<sup>8</sup> Although he did not specifically mention the drone strikes in Pakistan, Legal Advisor Koh did claim that US drone strikes in general comply, "...with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts." While Koh's words offered a starting point for the lawfulness debate, they did not provide the clarity needed to satisfy the critics of America's drone strike policy.

Since then, there have been three additional speeches offered by US government officials, which have echoed some of Koh's earlier comments regarding the lawfulness of America's targeted killing operations. In February of 2011, General Counsel for the Department of Defense, Jeh Johnson also asserted that the US was actively involved in

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<sup>7</sup> Harold Hangju Koh, "The Obama Administration and International Law," U.S. Department of State, 25 March 2010, 12, <http://www.state.gov/s/1/releases/remarks/139119.htm> (accessed 15 April 2012).

<sup>8</sup> Koh, "The Obama Administration and International Law," 12.

an armed conflict, and as such, had an inherent right to target valid military objectives consistent with the principles of war.<sup>9</sup>

One month later, Attorney General Eric Holder further echoed Koh's earlier comments in his own comments to a legal audience at Northwestern University. There, Holder attempted to assert the legal framework that authorizes America's right to use lethal force against terrorists living in foreign countries that are not at war with the US. Recognizing America's inherent right of self-defense, Holder argued that the horrific attacks of 9/11 triggered America's right to resort to the use of force. Holder also went on to state that America's authorization to use lethal force was not limited to specific zones of hot conflict. Instead, the Attorney General stated that the use of force to target non-state actors living in a foreign country would be legal provided the host state consented to the use of force within its territory, or in the alternative, "...was unable or unwilling to deal effectively with the threat to the United States."<sup>10</sup>

Finally, as recently as April 30, 2012, John Brennan, the Assistant to the President for Homeland Security and Counterterrorism similarly echoed Legal Advisor Koh's earlier arguments for the lawfulness of US drone strikes. Specifically, and consistent with America's stated policy, Brennan claimed that given America's ongoing armed conflict with al-Qaeda and the Taliban that the US was within its right to use lethal force to target these non-state actors in foreign territories.<sup>11</sup> Acknowledging that another state's sovereignty was a factor to determine the extent of America's right to use lethal force within that state, Brennan claimed

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<sup>9</sup> Jeh Charles Johnson, "National Security law, lawyers, and lawyering in the Obama Administration," Dean's Lecture at Yale Law School, 22 February, 2012, 3, <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school.com> (accessed 8 May 2012).

<sup>10</sup> Eric Holder, Speech at Northwestern University School of Law, Department of Justice, 5 March 2012, 3, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (accessed 8 May 2012).

<sup>11</sup> John O. Brennan, "The Ethics of Efficacy of the President's Counterterrorism Strategy," *Council on Foreign Relations*, 30 April 2012, 7, <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100> (accessed 8 May 2012).

that the inherent right of self-defense under international law provided the authority for it to target AQ and Taliban suspects living in another state provided the host nation consents to the use of force.<sup>12</sup> Brennan went on to state that, “[t]here is nothing in international law that...prohibits [the US] from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.”<sup>13</sup> Despite the US government’s attempts at clarity, the policy statements from each of these American officials have offered assertions regarding the lawfulness of America’s actions, but unfortunately, the statements have not offered the legal analysis required for one to determine whether the targeted killing operations in Pakistan comply with international law. Thus, the international community is left to do the legal analysis needed to answer the lawfulness question.

American policymakers consistently claim that the US is in, “...an *armed conflict* with AQ, the Taliban and associate forces.” (emphasis added). Implicit in these statements is the assumption that an armed conflict exists between the US and these foreign militants, and that this fact is not controversial. As stated previously, however, much of the controversy surrounding America’s lethal actions emanates from its assumption that it is involved in an armed conflict with these non-state actors. Absent is there mention by US Administration officials of the kind of armed conflict we are in with AQ, whether it is an IAC or NIAC, and whether the requisite elements of these types of armed conflict exist justifying the use of force under international law. By asserting an armed conflict exists, without performing the required legal analysis to determine if that is true, America policymakers have left themselves open to criticism. Such a fact continues to undermine the legitimacy of America’s targeted killing operations.

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<sup>12</sup> Brennan, “The Ethics of Efficacy,” 7.

<sup>13</sup> Brennan, “The Ethics of Efficacy,” 7.

Similarly, the public policy statements offered by the US are also devoid of references to HRL, which as previously shown, establishes the universal standards that makes force the exception as opposed to the rule. The absence of this language in the political discourse in these public statements is especially troubling considering that much of the international debate surrounds targeting non-state actors, which are civilians until proven otherwise. Such silence is problematic insofar as they invite accusations that America is conducting extrajudicial killings of individuals in violation of international laws.

America's stated policies also offer a legal interpretation that is unprecedented. While the US drone strike policy states it respects the sovereignty of states, it also states that in the absence of a host state's consent, it could violate the sovereignty of a nation if that nation was unable or unwilling to repress a militant threat emanating from within its territory. The implication from this US policy is that international legal authority provides the right for the US to use lethal force within the territory of another state absent its consent if it's a "weak" state.<sup>14</sup> The UN Charter, however, does not list an exception to the Article 2(4) on the prohibition to the use of force for weak states.<sup>15</sup> Similarly, the ICJ has consistently ruled that force used in self-defense may only be carried out within the territory of a host state, which itself is responsible for an armed attack against the US.<sup>16</sup> It appears that the new US policy regarding the use of force within "weak" states is meant to establish a new customary practice under international law. While over time, this customary practice may evolve into something seen as legitimate by the international community, at the present time the current US policy is not endorsed by statutory law, existing case precedent, or customary

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<sup>14</sup>Mary Ellen O'Connell, "Seductive Drones: Learning from a Decade of Lethal Operations," *Social Science Research Network*, 14, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1912635](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912635) (accessed 15 April 2012).

<sup>15</sup> UN Charter, art. 2(4).

<sup>16</sup> O'Connell, "Seductive Drones," 15.



practice. Thus, the continued lack of clarity and American transparency regarding the lawfulness of its targeted killing operation has made the international legal analysis of US drone strikes in Pakistan's FATA that more pressing.

### **The Legal Analysis of Drone Strikes in Pakistan**

Pakistan is a US ally, and as a fellow nuclear state, the US has a strong interest in ensuring that stable ties are developed and maintained with Pakistan. This would include ensuring that Pakistan's territorial sovereignty is respected and by providing assurances to the Pakistani people, to include the people of the FATA, that each one has a right to life as protected by the UN's Covenant of Civil and Political Rights (ICCPR).<sup>17</sup> This protection is resolute, and applies even to AQ and Taliban suspects that may have taken up roots in northwestern Pakistan. Underlying this protection guaranteed to the people of Pakistan is the notion that peace as opposed to war is the universally accepted norm in the global society. The HRL protections serve to ensure that Pakistan's domestic laws will provide a measure of due process to each tribal member, villager, or Taliban and AQ insurgent, and limit a State's use of lethal force only to those instances where taking a life is directly related to protecting a life that is under threat of imminent harm. Pakistan as well as the US has a duty to each Pakistani citizen to protect the right to life in accordance with HRL.<sup>18</sup> Should the US or Pakistan violate this inherent right, each can be subject to foreign and domestic prosecution for human rights law violations.

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<sup>17</sup> UN General Assembly, "International Covenant on Civil and Political Rights [hereinafter ICCPR]," *United Nations Treaty Series*, 16 December 1966, vol. 999, 171, <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 24 April 2012).

<sup>18</sup> UN Office of High Commissioner for Human Rights, "International Covenant on Civil and Political Rights," General Comment No. 6, "The Right to Life," Article 6, April 30, 1982, <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/84ab9690ccd81fc7c12563ed0046fae3?Opendocument> (accessed 24 April 2012).

Under international law, for lethal force to be authorized by the US on Pakistan's territory and against Pakistani citizens it must be proven that the laws of interstate force and IHL lawfully allow such actions. Each provide independent answers and in the end bring greater clarity to the lawfulness question.

### ***Jus ad Bellum: The Law of Interstate Force***

The drone strikes against the alleged insurgents in the FATA triggers the *jus ad bellum* laws because lethal force is being used by the US within the territorial confines of Pakistan. As it has been shown, the UN Charter limits the use of interstate force to two exceptions. The UNSCR may authorize the US to use lethal force in Pakistan.<sup>19</sup> In the alternative, the US may also employ lethal force in Pakistan under its inherent right of self-defense in accordance with Article 51 of the UN Charter.<sup>20</sup> As stated previously, the constraints imposed by the UN Charter sought to preserve the peace as the international status quo by making the use of force the exception as opposed to the rule. Thus, America's use of lethal force in Pakistan's FATA will be evaluated with this intent in mind.

To date, there has not been a UNSCR that has authorized US drone strikes in the FATA. Previously, UNSCR 1368 authorized the US to use all necessary means against those responsible for the 9/11 tragedy but it did not name a particular country within the resolution.<sup>21</sup> The consensus of the international community at that time was that Afghanistan was the source of support for AQ and its 9/11 attacks. It can be argued, however, that once the Taliban was removed from power

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<sup>19</sup> Mary Ellen O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009," *Social Science Research Network*, 6 November 2009, 13, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1501144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144) (accessed 24 April 2012).

<sup>20</sup> O'Connell, "Unlawful Killing with Combat Drones," 13.

<sup>21</sup> UN Security Council (SC), "Resolution 1368 [Threats to international peace and security caused by terrorist acts]," 12 September, 2001, <http://daccess-ddsny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement.htm> (accessed 24 April 2012).

in 2002 that the war of self-defense was terminated when President Hamid Karzai became the Afghan leader.<sup>22</sup> The Taliban insurgency rages on in Afghanistan, and as noted, has pushed extremists out of Afghan territory into Pakistan's FATA. Since Pakistan was not responsible for supporting AQ attackers on 9/11, without something more, UNSCR 1368 does not authorize US action on Pakistani territory.

There is evidence to suggest that America's inherent right of self-defense also does not authorize the US to conduct drone strikes on Pakistan's FATA. As the ICJ has consistently held State force may only be carried out on the territory of another state responsible for an "armed attack."<sup>23</sup> Pakistan's armed forces are not the ones that are conducting the cross border raids into Afghanistan. Instead, the raids are being conducted by the Taliban and AQ insurgents who are not under the control or direction of the Pakistani government. Although some have speculated that Pakistan secretly sponsors these insurgents as a hedge for future international relations, the legal analysis is based upon the objective and transparent evidence on the ground.<sup>24</sup> This evidence includes Pakistan's steady efforts to thwart, with military force, the growing insurgency in Pakistan's FATA, which tends to undercut the state-sponsorship claim.<sup>25</sup> According to the *Congo* ruling, the US is not authorized under a right of self-defense to conduct targeted killing

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<sup>22</sup> Mary Ellen O'Connell, "Seductive Drones: Learning from a Decade of Lethal Operations," *Social Science Research Network*, 11, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1912635](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912635) (accessed 15 April 2012).

<sup>23</sup> *Islamic Republic of Iran v. United States of America*, in *International Court of Justice Reports*, 6 November 2003, <http://www.icj-cij.org/docket/index.php?sum=634&code=op&p1=3&p2=3&case=90&k=0a&p3=5> (accessed 15 April 2012); *Democratic Republic of the Congo v. Uganda*, in *International Court of Justice Reports*, 19 December 2005, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=co&case=116&k=51> (accessed 15 April 2012); *Application of the Convention on the Prevent and Punishment on the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, in *International Court of Justice Reports*, 26 February 2007, <http://www.icj-cij.org/docket/files/91/13685.pdf> (accessed April 15, 2012).

<sup>24</sup> Jayshree Bajoria and Eben Kaplan, "The ISI and Terrorism: Behind the Accusations," *Council on Foreign Relations*, 4 May 2011, <http://www.cfr.org/pakistan/isi-terrorism-behind-accusations/p11644> (accessed 15 April 2012).

<sup>25</sup> Daud Khattak, "Evaluating Pakistan's Offensives in Swat and FATA," *Combating Terrorism Center at West Point*, 31 October 2011, <http://www.ctc.usma.edu/posts/evaluating-pakistan%E2%80%99s-offensives-in-swat-and-fata>, (accessed 15 April 2012).

operations in the FATA because Pakistan does not control or direct the actions of these non-state actors nor has Pakistan's armed forces conducted armed attacks on the US or Afghanistan.<sup>26</sup>

Even assuming, for the sake of argument, that Pakistan secretly sponsors these militants, the US drone strikes in Pakistan are still called into question. Under the *Caroline* test, a State may only resort to the use of force in self-defense when its "necessity...is instant, overwhelming, and leaving no choice of means and no moment for deliberation."<sup>27</sup> While the test acknowledges that the US does not have to wait to be struck first before it strikes with preemptive force, the US still must show that the cross border attacks by Taliban and AQ operatives were imminent and not just anticipated.<sup>28</sup>

While the details surrounding American drone strikes in Pakistan are tightly guarded, one would be hard pressed to argue that the drone strikes were used because necessity dictated that the militant threat was "imminent...overwhelming, and left no choice of means and no moment of deliberation."<sup>29</sup> On the contrary, the regularity of US drone strikes indicates that the US has had plenty of time to deliberate and respond to a militant threat that could hardly be construed as imminent. If anything, the offensive nature of American drone strikes in Pakistan amounts to the preventive use of force, which is unlawful according to the *Caroline* test, and thus, international legal standards.<sup>30</sup>

The US has offered a new legal interpretation as to what constitutes an "imminent threat," which would allow it to strike with lethal force in self-defense. According to Attorney General Holder, whether an individual presents an imminent threat, "incorporates

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<sup>26</sup> O'Connell, "Unlawful Killing with Combat Drones," 21.

<sup>27</sup> "The Caroline," 2 J. Moore, Dig. of Int'l L. 409, 412 (1906).

<sup>28</sup> "The Caroline," 412.

<sup>29</sup> "The Caroline," 412.

<sup>30</sup> Chris Jenks, "Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict," *Social Science Research Network*, 10 March 2010, 658, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1569904](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569904) (accessed 15 April 2012).

considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the US.”<sup>31</sup> This definition of an imminent threat to the security of the US, however, is a novel concept and to a certain extent invites subjective interpretation into an otherwise objective standard, which has been recognized by the international community for more than 100 years. It appears that this new US policy is being asserted with the understanding that over time, it will be adopted as customary practice by the international community. In the interim, however, such legal interpretation stands in stark contrast to the objective standard found within *the Caroline* test.

In February 2010, the Washington Post reported that, “[a]lthough the Pakistani government publicly complains about the drone attacks, it privately endorses the strategy under rules negotiated in mid-2008. This agreement permits the CIA to fire when it has solid intelligence and to provide ‘concurrent notification’ to Pakistan, which typically means shortly after a Hellfire missile is launched.”<sup>32</sup> Therefore, according to some, Pakistan’s private consent solves any claim that the US has violated international law.<sup>33</sup>

Even if Pakistan has given the US secret permission to conduct targeting killing operations in its territory, Pakistan’s consent only solves the sovereignty question. The US does not, however, have any more right to use lethal force against these non-state actors than Pakistan would have if they conducted the drone strikes themselves. While Pakistan’s secret consent makes moot the aggression claim, the US still must demonstrate that an armed conflict exists between Pakistan and an organized armed group within its territory before lethal force is

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<sup>31</sup> Holder, Speech at Northwestern University School of Law.

<sup>32</sup> David Ignatius, “What the Partisan Squabbles Miss on Obama’s Terror Response,” *The Washington Post*, 17 February 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021605043.html> (accessed 15 April 2012).

<sup>33</sup> Jenks, “Law from Above,” 662.

authorized according to IHL, a claim the US government has yet to put forward. Anything less would allow Pakistan's consent to trump HRL obligations, which forbid targeted killing operations outside of an armed conflict.

### **International Humanitarian Law**

Since at least 2004, Pakistan has been fighting with the Taliban in a conflict that has threatened the survival of the nuclear state. With over 16,000 fighters in Pakistan's FATA, the Taliban and its AQ associates have been responsible for the deaths of over 2,200 Pakistani soldiers, and even more unarmed civilians.<sup>34</sup> The Taliban and AQ fighters have been found responsible for numerous assassinations, to include the killing of Pakistan's former Prime Minister Benazir Bhutto. In addition to the slayings, it is believed that the Taliban and AQ fighters have also been responsible for a large number of suicide bombings in Afghanistan against which is has also declared Islamic jihad.<sup>35</sup>

It seems clear that Pakistan has engaged in hostilities with these militants in Pakistan's FATA, and that the US, assuming Pakistan's consent, has used targeted killing operations to destroy their common enemy.<sup>36</sup> The question then is does the nature of the conflict in Pakistan rise to the level of an armed conflict under IHL thereby justifying the use of lethal force? To justify the US drone strikes, it must be determined that an armed conflict exists from the objective evidence on the ground. IHL provides the legal basis for this examination.

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<sup>34</sup> Pamela Constable and Haw Nawaz Khan, "US Drone Attack May have Killed Leader of Pakistani Taliban," *The Washington Post*, 15 January 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011403033.html> (accessed 15 April 2012).

<sup>35</sup> Peter Bergen and Katherine Tiedermann, "The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan 2004-2010," *New America Foundation*, 24 February 2010, 1, [http://www.newamerica.net/publications/policy/revenge\\_of\\_the\\_drones](http://www.newamerica.net/publications/policy/revenge_of_the_drones) (accessed 15 April 2012).

<sup>36</sup> On the common enemy question, see Jenks, "Law from Above," 655.



## **The Existence of an Armed Conflict**

As it has been shown, there are two types of armed conflict under international law. International armed conflicts (IAC), and non-international armed conflicts (NIAC). It seems clear that the nature of the conflict between Pakistan and the Taliban is not an IAC because there is no state versus state action as required under the law.<sup>37</sup> Thus, if there is an armed conflict between Pakistan and the Taliban it will be because a NIAC exists between the State of Pakistan and an organized armed group.

## **The Organized Armed Group**

As stated previously, an organized armed group, according to the IHL, requires at a minimum, certain objective criteria that if met distinguish it from armed gangs that while criminal are not belligerents involved in an armed conflict. According to international law, for a NIAC to exist, the Taliban must be organized, the fighting must have a territorial nexus insofar as its main effort should be restricted to controlling territory within Pakistan, and the degree of fighting between the sides must be of a sustained and concerted character that there be no doubt an armed conflict exists between Pakistan and the insurgents.<sup>38</sup>

It appears that the Taliban is organized to the level required by international law. Under its native title, Tehrik-e-Taliban (TTP), the Pakistani Taliban has an organization structure that features a shura (parliament) that meets frequently to discuss grand strategy and to coordinate operational and tactical planning.<sup>39</sup> It has an emir, which is

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<sup>37</sup> O'Connell, "Unlawful Killing with Combat Drones," 20-1.

<sup>38</sup> See generally, Geneva Conventions I to IV, Common Article 3; Additional Protocol II.

<sup>39</sup> Shehzad H. Qazi, "An Extended Profile of the Pakistani Taliban," *Institute for Social Policy and Understanding*, August 2011, <http://www.ispu.org/pdfs/ISPU%20Policy%20Brief%20Extended%20Profile%20of%20Pakistani%20Taliban.pdf> (accessed 15 April 2012).



the president of the organization who executes policy.<sup>40</sup> While the command of the groups is centralized, the execution of operations are decentralized, which allows deputy, town and village commanders to carry out operations in accordance with the leadership's vision and intent.<sup>41</sup> The organization has developed effective recruiting techniques and thus, is able to draw large number of recruits to replace fallen victims on a regular basis.<sup>42</sup> The Taliban's fighters are provided a monthly stipend, which increases retention among the more veteran troops.<sup>43</sup> Thus, the Pakistani Taliban has the internal structure required of an organized armed group under IHL.

The Pakistani Taliban also has a territorial nexus that keeps it anchored to Pakistan. Since its inception the Taliban in Pakistan had ideological aims that sought to overthrow the Pakistan government and replace it instead with sharia law, the only law, according the group, justified in the Islamic state. In its campaign against the Pakistani government, the Taliban has formed a base of operations in Pakistan's FATA, where these non-state actors, in certain parts, have become the legitimate authority.<sup>44</sup> Indeed, the Taliban has won support by some of the population of the FATA by providing swift and free justice, and law and order, via their dispute-resolution centers and Sharia courts.<sup>45</sup> The FATA rugged mountainous terrain limits Pakistan's ability to reach the population much less protect the civilians from Taliban influence and control. Thus, the Taliban's ability to control some of the FATA meets the threshold requirement for it to be considered an organized armed group.

Finally, the fighting between the Pakistani Taliban is of a sustained and concerted character to distinguish it beyond just sporadic and

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<sup>40</sup> Qazi, "Profile of the Pakistani Taliban."

<sup>41</sup> Qazi, "Profile of the Pakistani Taliban."

<sup>42</sup> Qazi, "Profile of the Pakistani Taliban."

<sup>43</sup> Qazi, "Profile of the Pakistani Taliban."

<sup>44</sup> Qazi, "Profile of the Pakistani Taliban."

<sup>45</sup> Qazi, "Profile of the Pakistani Taliban."

isolated fighting. Since 2002, Pakistan's armed forces have been engaged in heavy military fighting with the Taliban and such hostilities have costs thousands of lives, and have displaced even more civilians from their homes and livelihood in the FATA.<sup>46</sup> The fighting continues at a moderate pace today with both sides using threats and violence to contest the population's loyalty in the remote villages of the FATA. There is no doubt that the sustained and concerted effort of violence from both sides has elevated the Taliban from a loosely knit terrorist organization to a well-organized armed group with territorial aims that have attained a legitimate level that can only be attributed to a belligerent in an armed conflict with Pakistan.

The analysis concludes that a NIAC exists between Pakistan and the Taliban because the Taliban is an organized armed group that has met the requirements of a belligerent. To stress its importance, however, it should be noted that the NIAC exists solely between Pakistan, and the organized armed group, and not between the US and the militants. This result is consistent with legal precedent, which has held consistently that the organized armed group must be contesting control of the host state's territory before a NIAC can be said to exist between the armed group and the occupied state. Thus, the character of the conflict between the US and the militants in Pakistan cannot be said to be an armed conflict because while these militants are organized, and violent, they are not contesting control over US territory given their remote location in Pakistan. Thus, absent Pakistan's expressed consent, the US drone strikes on Pakistan's territory violate international law.

To date, Pakistan has not publicly expressed its consent for US drone strikes within its territory. In fact, Pakistan has consistently voiced public opposition to American drone strikes and cited such

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<sup>46</sup> Pamela Constable and Khan, "US Drone Attack May have Killed Leader of Pakistani Taliban," *The Washington Post*, 15 January 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011403033.html> (accessed 15 April 2012).

incursions as continued violations of its sovereignty. In accordance with *Congo*, the US does not have a right under international law to assist Pakistan's military forces thwarting the militant's actions absent Pakistan's expressed consent.<sup>47</sup> Absent such consent, America's continued bombardment of militants in Pakistan's FATA violates international legal standards.

Pakistan may be secretly consenting to American drone strikes on its territory. While Pakistan's consent may allow America to fight a common enemy, it only makes moot the violation of Pakistan's sovereignty. As it has been shown, America's efforts to thwart the Pakistani militants must still comply with the LOAC, the same rules that Pakistan must comply with as it seeks to counter the aims of an organized armed group of non-state actors that have taken control over certain parts of the FATA. Thus, the principles of war must be evaluated to determine the lawfulness of the American drone strikes in Pakistan in Pakistan.

America's assertion that it is in an armed conflict with AQ, the Taliban and other associated forces is a conclusion that stands in contrast to the results from the legal analysis in Pakistan. As it has been shown, in order for a NIAC to exist between the US and these non-state actors, legal precedent states in pertinent part that the organized armed group must be contesting control over the territory of the Party with which it is fighting. It seems safe to say that these militants are not controlling US territory, and thus, under existing law cannot be said to be a belligerent involved in an armed conflict with the US. America's assertion that an armed conflict exists under international law seems to be an attempt, again, by the US Administration to meet what it perceives

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<sup>47</sup> *DEMOCRATIC REPUBLIC OF THE CONGO v. UGANDA*, in INTERNATIONAL COURT OF JUSTICE REPORTS OF JUDGMENTS, ADVISORY OPINIONS, AND ORDERS, 2005, paras. 42-53, 128, 147, 301, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=co&case=116&k=51> (accessed 24 April 2012); In *the Congo*, the ICJ speaks extensively on the importance of consent and its implications on the inherent right of self-defense under the law of interstate force.

to be a transnational threat from AQ and others with a relatively novel legal concept. While transnational terrorism offers unique challenges to American statesman and strategists, America's interpretation of what constitutes an armed conflict stands in contrast to existing international law.

### ***Jus in Bello: The Law of Armed Conflict***

American policy has consistently held that within the confines of the existing armed conflict with AQ, the Taliban, and other associated forces, that the US strictly complies with *jus in bello* principles. Thus, to determine whether the actions of the US align with its stated policy, it is necessary to analyze the evidence to see if the laws of war have been satisfied.

The US states that the drone strikes are necessary in the sense that they have definite military value.<sup>48</sup> According to John Brennan, strategically, the drone strikes are having their effect on AQ and the Taliban forces. The State Department official states that targeted killing operations against these militants has depleted their morale, and decimated the core structure of the militant's leadership circle.<sup>49</sup> According to the State Department, such actions have left Pakistani militants a shadow of their former selves and the continued pressure will ultimately lead to the downfall of AQ once and for all.<sup>50</sup> These US assertions give credence to the military necessity of the drone strike operations. There is evidence to suggest, however, that the results do not comport with the claims of the US Administration.

A recent study found that during the first ten months of President Obama's tenure, he authorized the CIA to conduct more than 41 drone strikes in Pakistan, a statistic that correlates to approximately one

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<sup>48</sup> Brennan, "The Ethics and Efficacy," 8.

<sup>49</sup> Brennan, "The Ethics and Efficacy," 3.

<sup>50</sup> Brennan, "The Ethics and Efficacy," 3.

targeted killing in Pakistan's FATA per week.<sup>51</sup> The Administration's apparent endorsement of targeted killing operations reinforces the notion that the drones are being used as a political tool. While this tactic provides a metric, counting the bodies, by which politicians can measure the relative success against transnational terror, according to some, the drone strikes have addressed the flies, but have left the swamp, the source of the militant's mobilizing influence, relatively untouched.

One leading counterterrorism expert, David Kilcullen, has challenged the drone's strikes contribution to the larger strategic picture. The former Chief Counterterrorism strategist for the US State Department has stated that the increased tempo and marked persistence of drone strikes in Pakistan's FATA, "displays every characteristic of a tactic—or, more accurately, a piece of technology—substituting for strategy."<sup>52</sup> The drone strikes in Pakistan, according the expert, are being carried out without a real effort to understand the dynamics of the problem, the people involved, or the motivations that guide them to take up arms.<sup>53</sup> Kilcullen has testified before Congress and argued that drone strikes in northwestern Pakistan are counterproductive.<sup>54</sup> While killing Taliban and AQ fighters extinguishes the lives of some bad actors, the success the US enjoys is only a tactical victory. Strategically, America is losing the war.

According to Kilcullen, US drone strikes have undermined the larger picture by aggravating the population who sees the US aggression as nothing more than a violation of their national sovereignty. The anger coalesces the population in Pakistan's FATA around the extremists,

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<sup>51</sup> Jane Mayer, "The Predator War," *The New Yorker*, 26 October 2009, [http://www.newyorker.com/reporting/2009/10/26/091\\_026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091_026fa_fact_mayer) (accessed 15 April 2012).

<sup>52</sup> David Kilcullen and Andrew Exum, "Death from Above, Outrage from Down Below," *The New York Times*, 16 May 2009, <http://www.nytimes.com/2009/05/17/opinion/17exum.html?pagewanted=all> (accessed 15 April 2012).

<sup>53</sup> Kilcullen and Exum, "Death from Above."

<sup>54</sup> David Kilcullen, *Effective Counterinsurgency: the Future of the US Pakistan Military Partnership*, 23 April 2009, Hearing of the House Armed Services Committee (Testimony of David Kilcullen), cited in O'Connell, "Unlawful Killing with Combat Drones," 19.

which leads to an ever increasing recruitment pool for fighters who wish to join the anti-US campaign.<sup>55</sup> The former and now deceased leader of the Pakistani Taliban, Baitullah Mehsud, echoed Kilcullen's assertion in regards to the drone strikes' recruiting effect when he said, "I spent three months trying to recruit and got only 10-15 persons. One US attack and I got 150 volunteers!"<sup>56</sup> This grim statement from the enemy confirms Kilcullen's fears that drone strikes, while tactically successful, undermine the strategic picture and calls into question whether they are necessary to achieve the larger strategic objective. It appears that the statistics support Kilcullen and Mehsud's conclusions as well.

According New America Foundation reporter, Peter Bergen, research has shown that despite a 56% increase in drone strikes in Pakistan's FATA in 2009 from the year prior, the level of militant violence in the region has increased exponentially. During 2009, in Pakistan there was a record setting 87 suicide attacks, which killed 1,155 civilians.<sup>57</sup> This grim figure reflects a 38% increase in violence from the year prior, and nearly a 900% increase in violence since 2006.<sup>58</sup> It also reflects the reality that military and civilian leaders have failed to tie drone strikes with the strategic goal of undermining the continued attraction of these terrorist organizations to the FATA's vulnerable population.

## **Distinction**

As it has been shown, civilians are a protected class of individuals that during armed conflict, which are not to be targeted directly with lethal force because they are non-combatants. This policy of civilian protection echoes the fundamental concerns of HRL that seeks to protect the arbitrary deprivation of life even during armed conflict. It is

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<sup>55</sup> Kilcullen, *Effective Counterinsurgency*.

<sup>56</sup> Qazi, "Profile of the Pakistani Taliban."

<sup>57</sup> Bergen and Tiedemann, "The Year of the Drone," 3.

<sup>58</sup> Bergen and Tiedemann, "The Year of the Drone," 3.

understood that the protection afforded civilians remains until such time they directly participate in hostilities (DPH). In Pakistan, while one can recognize the difficulty with distinguishing between those civilians that DPH and those that do not, the law still requires strict compliance so that innocent civilians in Pakistan's FATA are not arbitrarily deprived their right to life.

It has been offered by the US Administration that in no other time in history has there been a weapon that could allow a state to distinguish more effectively between civilians and AQ and Taliban militants. According to John Brennan, drones operate, "...with surgical precision—the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qaida terrorist while limiting damage to the tissue around it—that makes this counterterrorism tool so essential."<sup>59</sup> Indeed, the US Administration has asserted that it is hard to imagine a tool that can better minimize the risk to civilians than drones.<sup>60</sup> There is evidence, however, that challenges these US assertions.

Reputable news sources have confirmed that US drone strikes in Pakistan, on several occasions, have misidentified civilian personnel as lawful targets. One drone strike, which occurred three days after President Obama was sworn into office, caused the deaths of 20 innocent civilians because the drone operator sitting thousands of miles away in Nevada misidentified a civilian and his family as lawful targets. Jane Meyer, a writer for *New Yorker* magazine, claimed that the US drone erroneously targeted the house of a pro-Pakistani government tribal leader. According to Meyer, "the blast killed the tribal leader's entire family, including three children, one of them five years old."<sup>61</sup>

In another instance, a US drone strike targeted civilians attending a funeral. During the memorial service where prayers were being offered

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<sup>59</sup> Brennan, "The Ethics and Efficacy," 9.

<sup>60</sup> Brennan, "The Ethics and Efficacy," 8.

<sup>61</sup> Meyer, "The Predator War," 4.



for the deceased, the drones could be heard hovering overhead. The buzzing sound the drones make, nicknamed *machay* meaning wasp, signaled the beginning of a fire storm that claimed the lives of 10 children, four elderly tribal leaders, and left several more dead. The Pakistani news agency, *the News*, interviewed a civilian who had survived but lost a leg in the drone attack. The witness described the ordeal as taking place over the course of several minutes where during this time three Hellfire missiles, launched from multiple drones, were fired into the crowd of men, women, and children. According to the witness, through the smoke and dust, he could see and hear people screaming for help before falling to the ground and losing consciousness, having been struck by the third missile himself.<sup>62</sup> These unfortunate instances demonstrate the danger in relying upon technology as a one stop means for distinguishing a lawful target from the air without additional sources of intelligence to corroborate the drones onboard sensors.

It has been offered by the US Administration that compared with other options, "...a pilot operating [the drone] remotely—with the benefit of technology and with the safety of distance—might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians."<sup>63</sup> The statement by the US Administration reflects its reliance on a technology that may prove its worth in the long run. In the current situation, however, there is evidence, which has challenged this claim.

Eric Umansky wrote on the hazards of drone warfare, "looking through the Predator's camera is somewhat like looking through a soda straw...Your field of view tends to get distorted."<sup>64</sup> The author's sobering words offer a candid view of the limitations of the drone's cameras and their ability separate civilians from those who use the civilian terrain to

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<sup>62</sup> Mayer, "The Predator War," 14.

<sup>63</sup> Brennan, "The Ethics and Efficacy," 9.

<sup>64</sup> O'Connell, "Unlawful Killing with Combat Drones," 6.

mask their intentions and true identities. The importance of human intelligence (HUMINT) in Pakistan's FATA cannot be overemphasized as a complement to drone technology. Unfortunately, in Pakistan the US has little on the ground intelligence and what it does have is quite often untrustworthy. Local informants who live in the villages of Pakistan's FATA, who frequently are used as confirming witnesses for drone strikes, are notoriously unreliable.<sup>65</sup> Thus, one can only question how the distinction principle can be satisfied without a full picture of the identity of the person being targeted.

Reports have revealed that the CIA selects Taliban and AQ fighters in Pakistan's FATA for drone strike "neutralization."<sup>66</sup> Given the covert nature of the targeted killing operations, the names of the individuals selected have not been made public. The vetting process, however, nevertheless requires a certain amount of transparency so that the public can ensure that the individuals being targeted with drone strikes are not civilians but instead lawful targets under IHL.

What policy drives the vetting process, and who is in charge? Amos Guiora, a law professor and former advisor to Israeli commanders, expressed his concerns on the political oversight of drone strikes. According to Guiora, "[o]nce you start killing, you better make damn sure there's a policy guiding it...[i]t can't be just catch-as-catch-can."<sup>67</sup> Unfortunately, Guiora's worries may be well founded. According to former CIA general counsel, John Rizzo, CIA staffers determine whether to target someone with lethal operations.<sup>68</sup> That person's name is added to the list, which is signed off by CIA general counsel. The president does not review the individual names of people that are listed as targets

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<sup>65</sup> Mayer, "The Predator War," 13.

<sup>66</sup> Tara McKelvey, "Inside the Killing Machine," *The Daily Beast*, 13 February 2011, 2, <http://www.thedailybeast.com/newsweek/2011/02/13/inside-the-killing-machine.html> (accessed 15 April 2012).

<sup>67</sup> Mayer, "The Predator War," 11.

<sup>68</sup> McKelvey, "Inside the Killing Machine," 2.

for neutralization.<sup>69</sup> Thus, the CIA is in charge of a secret program that offers no visible system of accountability, despite the fact the US has killed many civilians inside a politically fragile nuclear armed country with which the US is not at war.<sup>70</sup> The CIA, which ironically has frequently been accused of operating according to its own law, is now responsible for ensuring that America's use of force complies with the laws of armed conflict.<sup>71</sup>

Despite the lack of transparency in the CIA's vetting process, the DODs target list, which is less opaque, may provide some insight into a growing trend that shows America is targeting individuals that have not DPH, let alone operated in a continuous combat function (CCF). Officially titled the Joint Integrated Prioritized Target List (JIPTL), the DODs roster now includes over 367 names of targets in Afghanistan where the military operates openly, and has an incentive to ensure, given its focus on stability operations, that lethal force is used sparingly and as a last resort.<sup>72</sup> Surprisingly, however, the DODs list now includes the names of over 50 Afghan drug lords who are suspected of helping to finance the Taliban and AQ fighters.<sup>73</sup> As it has been shown, civilians who provide financial support to an organized armed group, however, cannot be said to DPH because these acts are indirect and do not proximately cause injury to coalition forces.<sup>74</sup> Thus, according to IHL, these drug lords are unlawful targets because they maintain their civilian protection even though their behavior may be criminal. If drug lords are listed as lawful targets on the military's hit-list in contravention of legal

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<sup>69</sup> McKelvey, "Inside the Killing Machine," 2.

<sup>70</sup> Mayer, "The Predator War," 5.

<sup>71</sup> Nat Hentoff, "Obama's in Love with the Drones," *WND*, 27 July 2010, 2, <http://www.wnd.com/2010/07/184581/> (accessed 15 April 2012).

<sup>72</sup> Mayer, "The Predator War," 10.

<sup>73</sup> Mayer, "The Predator War," 10.

<sup>74</sup> International Committee of the Red Cross (ICRC), "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law [hereinafter Direct Participation in Hostilities]," Reports and Documents, Vol. 90, No. 872, 2008, 53, 66, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (accessed 24 April 2012).

precedent, one can only speculate the categories of targets that are chosen by the CIA, which operates in secret and is not deterred by the Uniform Code of Military Justice (UCMJ).

Even more ominous on the expansion of the CIAs target list are reports that the CIA, in some instances, is allowing Pakistan, a country with a horrible record of human rights' violations, to dictate who will be targeted for neutralization. Bruce Riedel, a former advisor to President Obama on Afghanistan and Pakistan, states that some of the names on the CIAs list include those nominated by the ISI, Pakistan's spy agency. Apparently, Pakistan's target nominations are part of the bargaining process between the two nations to secure Pakistan's acquiescence to American drone strikes inside the FATA. According to Riedel, on many occasions the names supplied by Pakistan were obscure to US counterterrorism officials. Despite CIA skepticism, however, these individuals were regularly targeted with lethal force.<sup>75</sup> While tight control of the CIA drone strike vetting process seems obvious, the loose command and control of US targeted killing operations in Pakistan coupled with its regular employment against obscure targets challenges the lawfulness of America's drone strike program in Pakistan.

### **Proportionality**

As the proportionality law requires, a state is prohibited from, "launching an attack which may be expected to cause incidental loss of life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."<sup>76</sup> As it has been shown, the test for determining what constitutes excessive under IHL requires examining an accurate and objective civilian casualty rate to determine the lives lost

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<sup>75</sup> Mayer, "The Predator War," 10.

<sup>76</sup> International Committee of the Red Cross, "Rule 14. Proportionality in Attack," Customary IHL, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14) (accessed 24 April 2012).

during a targeted killing operation. Once the casualty rate is assessed, it is then compared with the direct and concrete military objective pursued.<sup>77</sup> In NIAC, it has been suggested that this would include only targeting high ranking leaders of an organized armed group if it is anticipated that there will be any incidental civilian casualties. If the incidental civilian loss is excessive as compared with the direct and concrete military objective, the proportionality principle is violated and the drone strike is most likely unlawful.

The US Administration claims that drone technology offers America the ability to make informed decisions about the factors that might contribute to collateral damage.<sup>78</sup> Indeed, according to John Brennan, drone technology positively can identify a target while simultaneously ensuring with reasonable certainty that incidental civilian casualties will be kept to a minimum.<sup>79</sup> It would seem that in the larger picture, drones can decrease the incidental loss of civilian lives during an armed conflict, a net result that comports well with the proportionality principle. In Pakistan, however, the stepped up pace of American drone strikes have challenged US compliance with the proportionality principle.

In 2009, a targeted killing operation was conducted against the then leader of the Taliban in Pakistan, Baitullah Mehsud.<sup>80</sup> Over the course of several months, US intelligence officials tracked the Taliban leader's movements throughout Pakistan's FATA where he had planted roots from which he could orchestrate attacks against Pakistani leaders. One of Mehsud's most noted killings was his assassination of Prime

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<sup>77</sup> Barry A. Feinstein, "Proportionality and War Crimes in Gaza under the Laws of Armed Conflict," *Rutgers Law Record*, Fall 2009, 245, [http://lawrecord.com/files/36\\_Rutgers\\_L\\_Rec\\_224.pdf](http://lawrecord.com/files/36_Rutgers_L_Rec_224.pdf) (accessed 15 April 2012).

<sup>78</sup> Brennan, "The Ethics and Efficacy," 14.

<sup>79</sup> Brennan, "The Ethics and Efficacy," 14.

<sup>80</sup> "Pakistan Foreign Minister: Taliban Chief Baitullah Mehsud is Dead," *Voice of America*, 6 August 2009, <http://www.voanews.com/english/news/a-13-2009-08-06-voa54-68659907.html> (accessed 15 April 2012).

Minister Benazir Bhutto in 2007.<sup>81</sup> Mehsud was also said to be responsible for orchestrating a number of cross border raids into Afghanistan that had claimed the lives of Afghan civilians and coalition forces.<sup>82</sup> The end of Mehsud's life came on the night of August 5<sup>th</sup>, 2009 on the rooftop of a house in South Waziristan, a province in Pakistan's FATA. There, through the lens of an infrared camera, CIA officials were able to view Mehsud resting on his back while receiving an intravenous transfusion for a chronic medical condition.<sup>83</sup> He was surrounded by his wife, his uncle, his in-laws, and eight other men who were reported to be his body guards.<sup>84</sup> The Hellfire missile fired from the Predator drone two miles overhead killed Mehsud and the 11 additional people present.

It has been reported that it took approximately 16 separate drone strikes to kill the Taliban leader over a 14 month period.<sup>85</sup> During the hunt, between 207 and 321 additional people were killed.<sup>86</sup> Even assuming that all of those additionally killed were civilians, one might say, however unpalatable, that it was not excessive in relation to the concrete and direct military objective attained. Indeed, the death of Mehsud, while costly in terms of the civilian lives' lost, in the broader picture, may have been well worth the price. Unfortunately, the Mehsud case does not accurately gage US commitment to ensuring adherence to the proportionality principle. On the contrary, there is evidence to suggest that US drones regularly claim innocent lives while pursuing low-level foot soldiers that may not be worth the price of civilian blood.

A study by the New American Foundation has reported that since 2004, US drone strikes in Pakistan's FATA have killed between 830 and

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<sup>81</sup> Mark Mazzetti, "C.I.A. Sees Qaeda Link in the Death of Bhutto," *The New York Times*, 19 January 2008, <http://www.nytimes.com/2008/01/19/world/asia/19intel.html> (accessed 15 April 2012).

<sup>82</sup> "Pakistani Taliban Leader Sending Fighters to Afghanistan," *Chicago Tribune*, 25 May 2008, [http://articles.chicagotribune.com/2008-05-25/news/0805240398\\_1\\_baitullah-mehsud-pakistani-taliban-pakistan-people-s-party](http://articles.chicagotribune.com/2008-05-25/news/0805240398_1_baitullah-mehsud-pakistani-taliban-pakistan-people-s-party) (accessed 15 April 2012).

<sup>83</sup> O'Connell, "Unlawful Killing with Drones," 10.

<sup>84</sup> Mayer, "The Predator War," 3.

<sup>85</sup> Mayer, "The Predator War," 13.

<sup>86</sup> Mayer, "The Predator War," 13.



1,210 individuals, of whom between 550 and 850 were alleged to be militant fighters.<sup>87</sup> Peter Bergen, a coauthor of the report, states that the true civilian casualty rate since 2004 in Pakistan's FATA is approximately 32%, or approximately one innocent civilian lost for every two militants killed.<sup>88</sup> In an interview for New Yorker magazine, Bergen questions the importance of the targets being chosen in light of the escalating casualty rate.<sup>89</sup> Despite the US Administration's claims that they are targeting those that pose a significant threat to American interests, it seems the US is targeting low-level foot soldiers because they've run out of high ranking enemy leaders to kill.<sup>90</sup> It would appear that the US is on a slippery slope and has used drones for so long that the Administration has become immune to a civilian casualty rate that may have become excessive vis-a-vis the marginal objective of killing people with little connection to the fight.<sup>91</sup>

Some have argued that drone strikes in Pakistan's FATA are having a positive ripple effect on the insurgents. It has been argued that the drones have forced the enemy to live in a world of constant fear, which has caused suspicion and discord within the organized armed group.<sup>92</sup> At first glance, it could be argued that such disruptions in enemy cohesiveness should be fostered through the use of additional lethal force. The proportionality principle, however, demands that incidental civilians lives not be excessive in relation to a concrete and direct military objective anticipated. The fact that US drone strikes may create an atmosphere of fear and distrust among surviving militants is at most an indirect effect and anything but concrete. The insurgents have

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<sup>87</sup> Bergen and Tiedemann, "The Year of the Drone," 3.

<sup>88</sup> Bergen and Tiedemann, "The Year of the Drone," 3.

<sup>89</sup> Mayer, "The Predator War," 10.

<sup>90</sup> Brennan, "The Ethics and Efficacy," 11; Even though the administration claims they have killed most of the AQ leadership, the drone attacks continue in high numbers.

<sup>91</sup> This fact is contrary to US stated policy, which has claimed that it would use drones to target high-level belligerent leaders. See Koh, "The Obama Administration and International Law," 13.

<sup>92</sup> David Rohde, "A Drone Strike and Dwindling Hope," *The New York Times*, 20 October 2009, <http://www.nytimes.com/2009/10/21/world/asia/21hostage.html> (accessed 15 April 2012).



already shown their ability to pick up and move their operations when the threat of US drone strikes has become too great.<sup>93</sup> Instead, the broader picture reveals that the drone strikes are undermining US strategic efforts in the region. As stated previously, the strikes coalesce the population around the militants and consequently, a constant flow of volunteers regularly replaces fallen victims of the opposition. The civilian lives lost, however, have been harder to replace.

### **Humanity**

As it has been shown, humanity is a principle even in war and requires those that target others with lethal force to support efforts that preserve life through capture as opposed to using lethal force as a necessary end.<sup>94</sup> As the ICRC has stated, if the circumstances dictate that the individuals slated for targeting can be captured, the humanity principle requires the State to actively pursue this course of action. This requirement is consistent with HRL that serves to protect the lives of all individuals, including the lives of our adversaries, when the military objective can be attained peacefully and without having to resort to lethal force. As the ICRC guidelines state, “it would defy basic notions of humanity to kill an adversary or to refrain from giving him an opportunity to surrender where there manifestly is no necessity for the use of lethal force.”<sup>95</sup>

In Pakistan’s FATA not everyone deserves, “a Hellfire missile up their ass,” as National Security Council official Roger Cressey noted candidly.<sup>96</sup> Unfortunately, it appears that the policy behind US drones seems to be saying quite the opposite, and like any state sanctioned policy, once it becomes endorsed, the tendency is to expand its use until

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<sup>93</sup> Eric Schmitt and David E. Sanger, “Some in Qaeda Leave Pakistan for Somalia and Yemen,” *The New York Times*, 11 June 2009, <http://www.nytimes.com/2009/06/12/world/12terror.html> (accessed 23 April 2012).

<sup>94</sup> O’Connell, “Unlawful Killing with Combat Drones,” 24.

<sup>95</sup> ICRC, “Direct Participation in Hostilities,” 82.

<sup>96</sup> Mayer, “The Predator War,” 10.

it becomes standard operating procedure. The United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Philip Alston observes this phenomenon. Noting the “slippery slope” similarities between the CIA’s expanded use of drones to include targeting low-level foot soldiers, and its expanded use of waterboarding during routine interrogations of low-level operatives, Philip Alston in his report to the Human Rights Council states, “You start by saying we’ll go after the handful of 9/11 masterminds...[then]...it becomes standard operating procedure. It becomes all too easy. Planners start saying, ‘Let’s use drones in a broader context.’ Once you use targeting less stringently, it can become indiscriminate.”<sup>97</sup> It appears that US drone strikes in Pakistan’s FATA reflect the reality of Alston’s concerns.

The US Administration asserts that consistent with the principle of humanity, America prefers to capture terrorist suspects as opposed to killing them with lethal force.<sup>98</sup> One has to question, however, whether the actual practice that drives US drone strikes in Pakistan considers the humanity principle as obligated by international law and as claimed by the US Administration. Since President Obama took office there have been several hundred CIA drone strikes in Pakistan’s FATA.<sup>99</sup> One would have to assume that after all those strikes, on balance, there would have to be at least one high-level capture if the humanity principle was a meaningful part of US stated policy. Yet, despite the increased intensity of drone strikes launched under President Obama’s watch, there have not been any high-level captures and detentions of individuals by US forces in Pakistan’s FATA during this time.<sup>100</sup> It seems apparent that

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<sup>97</sup> Mayer, “The Predator War,” 9.

<sup>98</sup> Brennan, “The Ethics and Efficacy,” 12.

<sup>99</sup> Tara McKelvey, “Covering Obama’s Secret War,” *Columbia Journalism Review*, May/June 2011, [http://www.cjr.org/feature/covering\\_obamas\\_secret\\_war.php?page=all&print=true](http://www.cjr.org/feature/covering_obamas_secret_war.php?page=all&print=true) (accessed 23 April 2012).

<sup>100</sup> Ryan J. Vogel, “Drone Warfare and the Law of Armed Conflict,” *Social Science Research Network*, 1 December 2010, 128, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1759562](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1759562) (accessed 23 April 2012); The US Administration offers Ahmed Warsame, a member of al-Shabaab who was captured in

despite the Obama Administration silence on its secret drone strike program, its lethal actions have spoken loudly. Unfortunately, the message, in contrast to the US Administration's claims, seems to be that it is easier to kill than to afford its victims an opportunity to surrender.<sup>101</sup>

The facts reveal that there may be a couple of reasons that the US has failed to offer surrender as an option to these non-state actors. It seems to be based upon the current political climate. Some counterterrorism experts state that the Obama Administration prefers an aggressive approach against AQ and the Taliban because to them it seems more practical.<sup>102</sup> The Administration prefers to eliminate terrorist suspects as opposed to arresting them when presumably they would eventually be brought to Guantanamo Bay, Cuba (GITMO), a detention facility that President Obama pledged would be shut down in his run-up elections. A surplus of terrorists spared from lethal targeting would seem to undercut that political promise.

There may also be another reason that the Obama Administration prefers killing as opposed to capturing AQ and Taliban suspects. With some aggressive interrogation techniques, like waterboarding, now outlawed under US federal law, some have noted that these limitations on intelligence gathering have made capturing the enemy alive much less appealing.<sup>103</sup> Ironically, the safeguards meant to prevent the torture of suspected militants, in the end, may have played some part in killing them instead.

It appears that drones have offered the Obama Administration a lethal means that is politically accommodating. If the US Administration intends to kill as a necessary end then the drone is the perfect tool.

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Yemen in 2011, as proof of its commitment to the humanity principle. In Pakistan's FATA, however, there have not been any high level AQ or Taliban captures to date by US forces.

<sup>101</sup> See Brennan, "The Ethics and Efficacy," 12, where the US Administration claims that it prefers capturing as opposed to killing America's enemies.

<sup>102</sup> McKelvey, "Inside the Killing Machine," 2.

<sup>103</sup> McKelvey, "Inside the Killing Machine," 2.

From its stand-off position, drone strikes offer America's leaders quick kills and eliminate any messy questions of surrender all under a blanket of secrecy. Unfortunately, drone strikes and the US policy that makes them the one stop choice for dealing with terrorists may not comport with international legal standards.

## **Summary**

As it has been shown, HRL places obligations on the US to protect the right to life of all human beings, to include those living in Pakistan's FATA. As evident, the US does not have a legal right, under existing international law, to use interstate force within the territorial confines of Pakistan absent its expressed consent. To date, Pakistan has not publicly allowed the US to assert lethal force. While Pakistan's secret consent to US drone strikes in the FATA may resolve the sovereignty issues under the laws of interstate force, the laws of armed conflict must still be enforced so that the protected class of civilians are not arbitrarily deprive their right to life.

It seems clear that a NIAC exists between Pakistan and the Taliban. The Taliban is a recognized belligerent in the NIAC because it has been shown to be an organized armed group capable of establishing control within territory that it occupies, and it has engaged in sustained concerted hostilities with Pakistan since at least 2002. The nature of the NIAC, however, is solely between Pakistan and the organized armed group, and not between Pakistan, the US, and the organized armed group. Contrary to US claims, America is not engaged in an armed conflict with these actors, under current international law, because while the militants in Pakistan are both organized and violent, they are not physically contesting control over US territory. While the objective evidence points to an armed conflict between Pakistan and the organized armed group, the circumstances do not warrant the same conclusion with regard to the US and these foreign fighters. Thus, the State

Department's claim that America is involved in an armed conflict that reaches globally into other states that are not at war with the US is without precedent, and stands in stark contrast to international law.

Pakistan may secretly consent to American drone strikes on its territory. However, while Pakistan's consent may allow America to fight a common adversary, it only makes moot the violation of Pakistan's sovereignty. As it has been shown, America's efforts to thwart the Pakistani militants must still comply with the LOAC, the same rules that Pakistan must comply with as it seeks to counter the aims of an organized armed group of non-state actors that have taken control over certain parts of the FATA.

IHL limits the use of force between the US and the insurgents that are using Pakistan's FATA as a base of operations to conduct cross border raids on ISAF forces, and to challenge Pakistan's legitimate authority. The principles of necessity, distinction, proportionality and humanity are applicable given the existence of a NIAC.

There is evidence to suggest that the necessity principle may not be satisfied because US drone strikes are being used as a tactic as opposed to a strategy that is undermining the bigger picture. The evidence shows that US drone strikes are causing a backlash from the population that ensures a constant flow of recruits are ready to replace the fighters that have fallen victim to US drone strikes.

The evidence also shows that US drone strikes at times have misidentified civilians as lawful targets. There also is evidence that indicates that the groups of individuals selected for targeting are frequently unknown to the US, and include some classes of individuals that while criminal are not lawful targets according to international law. Despite its technology, the evidence has shown that drones offer only a limited view of the person being targeted, and without adequate ground support to re-confirm target selection, these lethal operations continue to undermine the distinction principle.

While the now deceased Baitullah Mehsud is frequently touted as an example of the type of individuals targeted with US drone strikes in Pakistan, the evidence has shown that this instance is not reflective of their general use. Instead, it appears that their regular use now is against low-level foot soldiers that have only a slight impact on operations. With a 32% civilian casualty rate, it would appear that these losses have become excessive as compared to the military objectives, goals that are marginal at best and are not worth the price of civilian lives.

Finally, it appears that the US drone strikes in Pakistan have become a necessary end under all of the reported circumstances. Under President Obama's watch there have been zero US captures of high-level militant leaders in Pakistan's FATA, and actual US practice seems to endorse killing an individual as opposed to offering him an opportunity for surrender. With a US policy that sanctions drone strikes and makes its everyday use the desired end state, it can be argued that the US continues to fail to meet its human rights' obligations under IHL.

## **Conclusions**

As it has been shown, HRL, the law of interstate force, and IHL provide the legal lenses through which one can determine the lawfulness of US drone strikes in Pakistan's FATA. All three of these legal frameworks are relevant to the lawfulness question, and while treated separately for discussion purpose, round out a mixed mode legal paradigm, which have been used to determine the lawfulness of American drone strikes in Pakistan's FATA.

As evident, HRL ensures that the lives of all human beings are protected from the arbitrary use of lethal force. The right to life is an inalienable right that is afforded to all human beings, including those militants living in Pakistan's FATA. HRL represents the collective understanding of international society that peace as opposed to war shall be the international status quo. A lesser standard would make the use of force the rule as opposed to the exception, and would thus, jeopardize the right to life protections that HRL provides.

International law recognizes that there will be times when war as opposed to peace becomes a reality. While recognizing that armed conflict may erupt, legal standards have been adopted by the international community that ensures that the right for a state to resort to the use of force is limited, and has delineated boundaries to the area of hostilities. These legal standards are reflected in both the laws of interstate force, and IHL.

The laws of interstate force limit when a state may resort to the use of force within the territorial confines of another state. These laws were codified by the international community and reflected a carry-over understanding from HRL that peace as opposed to war should be the international status quo. As it has been shown, absent a UNSCR, a state has right to defend itself to the extent that it is the unfortunate victim of an armed attack. The self-defense right is not limitless, however, and



cannot be used as cover for State action that amounts to the preventive, and unlawful, use of force. Unless a state has suffered an armed attack from a second state, it does not have a right to resort to the use of force in self-defense.

As the ICJ held in *Congo*, the violent actions of non-state actors that seek to do another state harm will rarely rise to the level of an armed attack under international law. Instead, the proper remedy for dealing with non-state actors that persistently conduct deadly attacks from foreign lands will be through criminal prosecution under a domestic law enforcement framework. This view is consistent with the fundamental importance of safeguarding every person's right to life as guaranteed by the International Covenant on Civil and Political Rights (ICCPR). Thus, a State is not lawfully permitted to resort to the use of force to target foreign non-state actors because they are criminals, as opposed to belligerents involved in an armed conflict.

As it pertains to the laws of interstate force, a host state's consent may make moot a potential aggression claim that could have been brought against a foreign state that used lethal force within its borders. The consent, however, only confers the same amount of rights and responsibilities on the foreign state that the host state possesses based upon the circumstances on the ground. If peaceful conditions exist within the host state, then HRL is the *lex generalis* law that ensures that criminals operating within the host state's borders are provided an opportunity to surrender, and makes their capture and arrest the positive aims of domestic law enforcement. In the alternative, if an armed conflict exists between the host state and the non-state actors, then the LOAC become the *lex specialis*, which makes the rules of war the primary legal lens, which allows the State to target these actors with lethal force provided the rules of war have been entirely satisfied. Thus, the context of the situation matters.

In order for lethal force to be used against non-state actors, it must be determined that a non-international armed conflict (NIAC) exists between the host state and an organized armed group. This determination is made based upon the objective circumstances on the ground, and not by the subjective assertions by foreign government that may have political reasons for claiming the existence of an armed conflict when the facts do not support such contentions. As it has been shown, in order for a NIAC to exist, it must be determined that the group of non-state actors is organized, is capable of controlling territory, and its fighting must be of a sustained and concerted character leaving no doubt that the organized armed group is capable of contesting the legitimacy of the host nation's government. Absent this showing, the armed group while criminal, is not a belligerent organization subject to lethal targeting.

Even if the group of non-state actors is determined to be a belligerent involved in a NIAC, the principles of war must be satisfied in their entirety before targeting someone with lethal force. This includes ensuring that lethal force is necessary, and that one is capable of distinguishing between civilians and those that DPH. Similarly, this also includes ensuring that any incidental civilian deaths are proportionate to the military objective attained. It also includes ensuring that lethal force is not used as a necessary end in all circumstances, but instead, only as a viable option if the belligerent's capture cannot be reasonably secured. The humanity principle requires nothing less.

The US characterization of its fight with AQ, and the Taliban as an armed conflict that stretches globally undercuts the institutional norms that have made peace as opposed to war the international status quo. Under current international law, the world is not a battlespace where the US has free reign to target individuals with lethal force based upon its own subjective assertions that it is involved in a global fight with these militants. The US policy, which conducts drone strikes in Pakistan's

FATA, threatens the sanctity of these legal measures, which were developed to ensure that peace was the recognized international norm. An American policy that claims the world as its battlezone in its campaign to rid the world of bad actors undermines international legal standards by making the use of force the rule as opposed to the exception.

As it has been shown, in Pakistan's FATA, the US has conducted covert targeted killing operations against militants under the claim of an asserted armed conflict. The character of the conflict between the US and these militants, however, cannot be characterized as a NIAC between these parties because while these militants are organized, and violent, they do not have territorial control within the US, which would promote the group to belligerent status. Instead, the objective evidence regarding an armed conflict seems to indicate at most that an armed conflict exists between Pakistan and the Taliban, and their AQ supporters in the FATA. Consequently, absent Pakistan's expressed consent, the US drone strikes on Pakistan's territory may violate international law. Thus, there is a gap between what the US Administration claims it can do and the international legal mandates that determine the lawfulness of such actions.

As it has been shown, to date Pakistan has not publicly expressed its consent for US drone strikes within its territory. Instead, Pakistan has consistently voiced public opposition to American drone strikes and cited such incursions as continued violations of the country's sovereignty. In accordance with the ICJ holding in *Congo*, the US does not have a legal right, under international law, to assist Pakistan's military forces in thwarting the militants' actions in the FATA absent Pakistan's expressed consent. Absent such consent, America's continued bombardment of militants in Pakistan's FATA would violate international legal standards.

Pakistan may be secretly consenting to American drone strikes on its territory. While Pakistan's consent may allow America to fight a common enemy, it only makes moot the violation of Pakistan's sovereignty. As it has been shown, America's efforts to thwart the Pakistani militants must still comply with the LOAC, the same rules that Pakistan must comply with as it seeks to counter the aims of an organized armed group of non-state actors that have taken control over certain parts of the FATA. As the evidence has shown, unfortunately, it does not appear that America has complied with the rules of war.

Is lethal targeting of Taliban and AQ militants in Pakistan's FATA a military necessity? There is evidence to suggest that in the larger picture, targeting these militants while tactically successful has undermined the strategic goal of negating the source of the insurgency. Militant body counts are an appealing metric to American politicians who seek to gauge their relative success of their war on terror. Overall, however, American drone strikes are a temporary fix to a broader dilemma that is not being adequately addressed by America's lethal actions. In light of the above, and based upon the evidence, one has to conclude that the US drone strikes in Pakistan may be in violation of the necessity principle of war.

As it has been shown, at the heart of the distinction principle lies the understanding that civilians are to be protected at all times during armed conflict, and are not to be targeted with lethal force absent their direct participation in hostilities (DPH). Unfortunately, the evidence has shown that on some occasions, the US has mistakenly targeted men, women, and children with covert drone strikes in Pakistan. While the vetting process the US uses to designate a person for neutralization is anything but clear, international legal standards requires a certain amount of transparency so that the international community can ensure America is not targeting individuals that while criminal, are nevertheless

civilians accorded protection from lethal targeting under international law.

As it relates to the proportionality principle, for some, the drone strikes have been touted as an overarching success based upon their ability to create an atmosphere of fear and distrust among surviving insurgents. Such environment, as it has been advocated, can dismantle the militants command circle from the inside out. As it has been shown, however, proportionality's legal analysis is determined by comparing the incidental civilians lives lost with the direct and concrete military objective attained. A fearful environment among surviving militants is an indirect result of a lethal targeting campaign that has run out of high-level AQ and Taliban leaders, and has opted instead, to pursue low-level foot soldiers with only a minor connection to the fight. The principle of proportionality places a high demand on US efforts to ensure that even incidental civilian deaths are avoided to the extent possible. America's covert actions may be continuing to undermine this rule of war.

Finally, it also appears that America's actions may not be in conformance with the humanity principle, which continues to operate even in war. As stated previously, at the heart of the humanity principle lies the understanding that in armed conflict, the right to life of a belligerent should not be automatically deprived by lethal force when the situation allows for his surrender, or capture. Anything less, would allow lethal force in an armed conflict to be the necessary end pursued in all situations even though the circumstances in the larger war effort, allowed for a less destructive means to achieve the same result. As the evidence has shown, after hundreds of drone strikes under the Obama Administration, not one high-level militant has been captured by US forces in Pakistan's FATA. Given such facts, one has to wonder whether the US considers the humanity principle in practice when determining the necessity of using lethal force to target AQ and Taliban militants in Pakistan. Without targeting guidelines that are transparent to the

international community, one is only able to conclude that America's use of force to target these insurgents may not comply with international legal standards.

The evidence has suggested that at times America's targeted killing operations in Pakistan have compromised the provisions of HRL, the laws of interstate force, and IHL, which collectively form a mixed mode legal paradigm the international community uses to judge the lawfulness of America's actions. Consequently, while the State Department's official policy regarding drone operations has been to comply by "word and deed" in accordance with applicable international law, the evidence suggests that America's covert targeted killing program in Pakistan has undermined that claim.<sup>1</sup>

The gap between America's words and actions seems to be a reflection of American power politics trying to right itself with the covenants, treaties and declarations of legal regimes that for years have governed the behavior of states in the international community. Prior to 9/11, America's policy regarding targeted killing operations was that these missions were unlawful and in violation of international legal standards. Post 9/11, America's stance toward targeting killing operations completely reversed course and made the use of force through drone technology standard operating procedure. This policy reversal may be explained by realist ideology, which demanded a strong military response to counter any perception of American weakness following the 9/11 attacks. On this point, former Secretary of State, Lawrence Eagleburger, said, "You have to kill some of these people; even if they were not directly involved, they need to be hit."<sup>2</sup> Such American political

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<sup>1</sup> Harold Hangju Koh, "The Obama Administration and International Law," U.S. Department of State, 25 March 2010, 12, <http://www.state.gov/s/1/releases/remarks/139119.htm> (accessed 15 April 2012).

<sup>2</sup> Ziauddin Sardar, "Where is the Hand of my God in this Horror?" *New Statesman*, 17 September 2001, <http://www.newstatesman.com/node/141151> (accessed 8 May 2012); Mary Ellen O'Connell, "Seductive Drones: Learning from a Decade of Lethal Operations," *Social Science Research Network*, 19, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1912635](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912635) (accessed 15 April 2012).

sentiment reflects a realist ideology that has clouded the understanding of the limited utility of military force, and the legal rules that were meant to limit its use to the most extraordinary of situations. Thus, the disparity between America's words and actions in its broader effort to deal with transnational terrorism reflects a struggle between the tenets of realism, and the standards of conduct that have been instilled by the international legal regimes. Unfortunately, America's power politic response to 9/11 has sacrificed the long term benefits of legal compliance for the short term gains of defection. Such reality has negative implications for US national security.

Robert Keohane said that international legal standards are vital to international stability because they solidify a body of knowledge, laws, customs, and norms that can help to organize the relationships among states and provide certainty for future dealings.<sup>3</sup> In the broader picture, states should adhere to these legal mandates, not because they are necessarily in their short term best interests, but because over the long term they establish mutual expectation about the behavior of other states, and thus, reduce relative insecurity.<sup>4</sup> While the anarchic system of international order allows one state to defect from compliance with the international rules, in most cases, the costs incurred from such defection far outweighs its short term benefits. A state that defects from international legal standards risks tarnishing its reputation, and soft power influence, which can lead to international isolation.<sup>5</sup> In addition, the costs imposed on the defecting state by the threat of reciprocal retaliation go drastically up when one considers its long term impact it has on the extent of future dealings with international society.<sup>6</sup> Cooperation based upon reciprocity is persuasive given that the self-

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<sup>3</sup> Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, (Princeton: NJ: Princeton University Press, 1984), 89.

<sup>4</sup> Keohane, *After Hegemony*, 89.

<sup>5</sup> Keohane, *After Hegemony*, 105.

<sup>6</sup> Robert Axelrod, *The Evolution of Cooperation*, (New York: NY: Basic Books, 1981), 77, 174.



policing system can impose costs that cannot be justified vis-a-vis the short term defection gains.<sup>7</sup>

It appears that American power politics may be compromising the long term benefits of complying with international legal standards for the short term gains of defection. While drone strikes in Pakistan has offered policymakers a metric, counting the bodies, by which to measure their relative success in office in their war on terror, America's defection from the international legal standards that regulate the use of force threatens to undermine America's international legitimacy in the long term.

There are transparency and accountability obligations under HRL, the laws of interstate force, and IHL that demand full compliance by the international community. Despite the global outcries regarding the lawfulness of American drone strikes, US policymakers continue to deny even their existence in Pakistan. The US continues to conduct targeted killing operations in the FATA, but yet has failed to realize its actions are no longer covert, and the world is watching. Reputable news sources are reporting daily on American drone strikes and the death toll continues to climb without a clear answer. Speaking before Congress on the threats that drone strikes bring to American legitimacy, Kenneth Anderson notes, "[t]here are ways to articulate the legal basis of these policies without having to reveal the operational matters, and the legitimacy of the [US] programs over the long haul is distinctly at issue."<sup>8</sup> Without a course correction in the future, American legitimacy in the eyes of the international community is directly at stake.

America's perceived defection from international legal standards threatens to bring a reciprocal response in the future by states with adverse political agendas to US national security interests. The US stated position and practice on targeted killing operations over time will

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<sup>7</sup> Axelrod, *The Evolution of Cooperation*, 174.

<sup>8</sup> Kenneth Anderson, "Written Testimony," House, *Rise of the Drones: Unmanned Systems and the Future of War*, 111th Cong., 2nd sess., 2010, 11.

become customary practice that other nations will follow. This includes nations such as Iran, China, and Russia.<sup>9</sup> The US policy that allows for drone strikes to be conducted outside of declared war zones wherever America's enemies are found sets a troubling precedent that the US might not want to see followed in the future by nations with anti-US political agendas. Reciprocity dictates that what goes around, comes around. In the future, the US may find itself, without a course correction, on the receiving end of the same policies it helped establish much to its own demise.

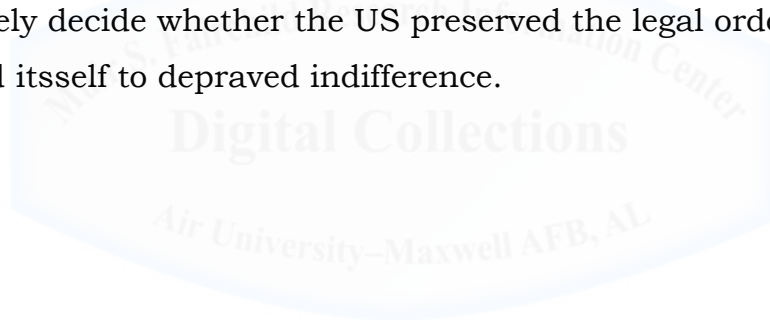
It seems that in recent times the US has made efforts to be more transparent regarding its drone strike policies. The latest statement by Counterterrorism Advisor John Brennan is good step forward in this direction. His statement, however, reflects a growing trend by US officials to incorporate new law into international practice through customary use without multilateral engagement. Perhaps fifty years from now, the American practice regarding targeted killing will be recognized by the international community as legitimate. In the interim, however, without the transparent legal precedent used to support its claim that it is justified in using lethal force within the confines of "weak" states, for example, America's silence in this regard continues to undermine its credibility much to its long term detriment.

If America is implementing new legal precedent through customary use, perhaps, a better approach would be to engage multilaterally with the international community on these issues so that it can continue to offer the transparency that these legal standards deserve. Doing so in this forum will reflect the collective endorsement, if warranted, by the international community, which serves to better insulate the US from claims that it is not abiding by international law.

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<sup>9</sup> Peter Singer, "Do Drones Undermine Democracy," *The New York Times*, 21 January 2012, <http://www.nytimes.com/2012/01/22/opinion/sunday/do-drones-undermine-democracy.html?pagewanted=all> (accessed 27 April 2012).

As the hegemon in the unipolar world, the US has a responsibility to ensure its compliance with the international legal standards that limit the use of lethal force to the most extraordinary of situations. This American obligation includes adhering to HRL, the laws of interstate force, and IHL. In the long view, adherence to these legal mandates are in America's best interests because it stabilizes the world order by bringing certainty for its future dealings with the international community. American compliance also helps ensure its ongoing legitimacy in the eyes of the international community, and engenders reciprocal behavior from other states by setting the example for others to follow. In the end, adhering to HRL, the laws of interstate force, and IHL is fundamental to preserving world opinion, the judge and jury that will ultimately decide whether the US preserved the legal order, or instead, reduced itself to depraved indifference.



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